

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1326

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
FRANK MANGAN and
KEVIN MANGAN,
Defendants-Appellants.
-----x

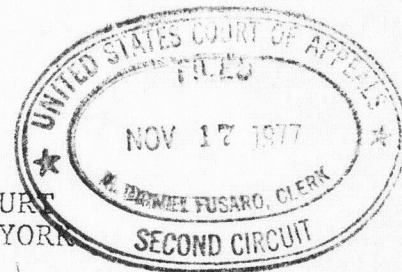
Docket No. 77-1326

Docket No. 77-1339

B
p/s

JOINT APPENDIX TO
APPELLANTS' BRIEFS

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FRANK MANGAN
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971
HENRY WINESTINE,
Of Counsel.

LAWRENCE STERN, ESQ.,
Attorney for Appellant
KEVIN MANGAN
11 Monroe Place
Brooklyn, New York 11201
(212) 875-4304

PAGINATION AS IN ORIGINAL

CRIMINAL DOCKET - U.S. District Court

PETTY OFFENSE PO ☐ JUDGE/MAGISTRATE Assigned U.S. vs. **MANGAN, FRANK**
 OTHER MINOR OFFENSE MO ☐ **0208 1 0858**
 OTHER MISDEMEANOR MIS ☐ Disposition
 FELONY Fel ☒ District Office (LAST FIRST MIDDLE)

Case Filed Mo. Day
03 02 **77** **0165** **01**
 No. of Defs. * **02**
 JUVENILE

U.S. TITLE/SECTION

18:286
 18:1341
 26:7206(a)

OFFENSES CHARGED

Consp. to defraud Internal Revenue Service
 Mail Fraud
 Filing false & fraudulent tax statements with
 the I. R. S.

ORIGINAL COUNTS

1
 2-6
 7-13

U.S. MAG.
CASE NO.

BAIL • RELEASE

☐ AMT ☐ Fugitive
☐ Denied ☐ Set ☐ Pers. Recog.
☐ S ☐ CO ☐ PSA
☐ Date ☐ 10% Deposit
☐ Bail Not Made ☐ Surety Bond
☐ Status Changed (See Docket) ☐ Collateral
☐ 3rd ☐ Other
☐ Pity Cust

II. KEY DATES & INTERVALS

ARREST or

U.S. Custody Began

Summons Served

First Appearance

INDICTMENT

High Risk Date

Information

3-2-77

Indict. Waived

In Charging District

Superseding

Indict/info

ARRAIGNMENT

Trial Set For

3-10-77

1st Plea

3-10-77

Final Plea

SUPERSEDING
COUNTS

TRIAL

Trial Began

3-31-77

Trial Ended

C-20-77

SENTENCE

Disposition of Charges

6-20-77

7-26-77

On All Charges

On Lesser Offense(s)

Acquitted

Dismissed

On Government Motion

MAGISTRATE

Search Warrant

Issued

Return

Summons

Issued

Served

Arrest Warrant Issued

COMPLAINT

OFFENSE

(In Complaint)

DATE

INITIAL/NO.

INITIAL APPEARANCE DATE

PRELIMINARY EXAMINATION OR REMOVAL HEARING

Date Scheduled

Date Held

Waived

NOT WAIVED

INTERVENING INDICTMENT

INITIAL/NO.

OUTCOME

DISMISSED

HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

ATTORNEYS

Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Set ☐ None / Other ☐ PD ☐ CO

U.S. Attorney or Asst.

James P. Lavin
 791-0038

* Show last names and suffix numbers of other defendants on same indictment/information.

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
3-2-77		Filed Indictment. B/W Ordered. Indictment Ordered sealed.Frankel, J. <i>B/W ISSUED.</i>	
3-3-77		Indictment Ordered unsealed.....Frankel, J.	
3-10-77		Deft. (atty. Leonard Rosenblatt for arraignment purposes only) pleads not guilty. Case assigned to Stewart, J. for all purposes. Bail of \$15,000 PRB co-signed by mother & father continued. 10 days for motions.....Bryan, J.	
3-10-77		Filed notice of appearance of Leonard R. Rosenblatt as attorney for deft. for arraignment purposes only.	
3-11-77		Filed the following papers rec'd from Mag Raby (Mag #77-240) Docket entry sheet-copy of IND.-Warrant for arrest of deft Executed 3-3-77- disposition sheet-appearance bond in the amount of \$15,000 dated 3-3-77	

DATE	(DOCUMENT NO.)	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY				LETTER CODES
				Interval Section (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)	
3-22-77		P/T conference held Atty Lawrence Feld Esq, present.						A. Examination or hearing for mental or physical incapacity (18 U.S.C. 4244)
4-15-77		Filed affid & notice of motion of deft FRank Mangan for dismissal. A B/P , & a list of witnesses						B. NARA Examination (28 U.S.C. 2902)
4-15-77		Filed memorandum of law in support of deft;s pre-trial motions						C. State or Federal trials on other charges.
5-5-77		Filed Govt's memorandum of law in opposition to the motions of the deft's for discovery & inspection B/P & for a list of witnesses						D. Interlocutory Appeals.
5-10-77		Filed reply memorandum in support od deft Motions for a B?P. a list of the Govt's witnesses & for discovery of deft; s statemnets						E. Hearings on pretrial motions.
5-11-77		Filed reply memorandum in support of deft's motions to dismiss counts two thru six of the indictment						F. Transfers from other districts (per F.R.Cr.P. Rules 20, 21 & 40)
5-13-77		Filed deft's affid & notice of motion for suppression of statements, evidence & wiretap etc.- Dismissal of the indictment, severance etc.						G. Defendant Motion is actually under advisement. Period of up to 30 days is excludable per 3161(h) (1) (G).
5-16-77		Filed MEMORANDUM Deft has moved for B/P & discovery- Part denied & part GrantedSo ordered Stewart,J. M/N						H. Miscellaneous Proceedings: Probation or Parole revocation, Deportation, Extradition.
5-20-77		Suppression hearing begun....STEWART,J.						I. Prosecution deferred by mutual agreement.
5-23-77		Suppression hearing continued						M. Unavailability of defendant or essential witness.
5-24-77		" " "						N. Period of mental or physical incompetence of defendant to stand trial.
5-25-77		" " "						O. Period of NARA Commitment or Treatment.
5-26-77		" " "						P. Superseding indictment and/or new charges.
5-31-77		Jury empannelled trial begun						R. Defendant awaiting trial of Co-defendant when no severance has been granted.
6-1-77		Jury continued						T. Continuances Granted per 3161(h) (5) (i.e. ends of justice or complexity of case outweighs defendant's interests)
6-2-77		" "						U. Time between guilty plea and plea withdrawal.
6-6-77		" "						W. Grand Jury indictment extended per 3161 (b).
6-7-77		" "						
6-8-77		" "						
6-9-77		" "						
6-10-77		" "						
6-13-77		" "						
6-14-77		" "						
6-15-77		" "						
6-16-77		" "						
6-17-77		" "						
6-20-77		Trial continued & concluded Deft GUILTY as charged . PSI ordered Bail continued sent adj to 7-26-77 at 10:00 A.M.STEWART,J.						
6-22-77		Filed Govt's memorandum of law in opposition to the motion of deft to dismiss counts 2 thru 6 of the indictment						
6-22-77		Filed Govt's affid in opposition to the various motions of deft filed with this court Friday 5-13-77						
7-6-77		Filed envelope (Documents from Suffolk County D.A) ordered sealed & impounded...STEWART,J. (placed in cashiers vault)						

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
	(Document No.)				
7-12-77	Filed deft's proposed examination of prospective jurors				
7-19-77	Filed Transcript of record of proceedings, dated MAY 22, 23, 24, 25, 26, 1977				
7-19-77	Filed Transcript of record of proceedings, dated MAY 31, JUNE 1, 2, 3, 7, 7, 1977				
7-19-77	Filed Transcript of record of proceedings, dated JUNE 12, 13, 14, 15, 16, 17, 20, 1977				
7-26-77	Filed JUDGMENT & COMMITMENT DEft (atty present) The deft is hereby committed to the custody of the Atty General or his authorized representative for imprisonment for a period of TWO (2) YEARS ON each of Counts 1 thru 13, and sentence imposed on each of counts 1 thru 13 inclusive are to run concurrently with each other. Bail to be continued pending appeal. Deft advised of his rights to appeal.... STEWART, J. copies issued				
7-26-77	Filed personal reg. bond in the amount of \$15,000 dated 7-26-77				
8-3-77	Filed notice of appeal from the judgment entered on the 26th day of July 1977 (copy mailed to US Atty & deft's atty)				

AO 256A

Interval (per Section III) | Start Date | Ltr. Total
End Date | Code Days

A TRUE COPY

RAYMOND A. BURCHARDT, Clerk

Deputy Clerk

TY OFFENSE PO ☐ JUDGE/MAGISTRATE Assigned U.S.
 OR OFFENSE MO ☐ 0208 1 0858
 SDEMEANOR Mis ☐ Disp./Sentence
 FELONY Fel ☒ District Office

vs. MANGAN, KEVIN

(LAST, FIRST, MIDDLE)

Case Filed
 Mo. Day
 03 02
 No. of Def's
 * 02

77 0165 02

Vr. Docket No. Del

U.S. MAG.
CASE NO.

BAIL • RELEASE

☐ AMT ☐ Fugitive
 Denied Set ☐ Pers. Recog.
☐ PSA

S 000 conditions

Date ☐ 10% Deposit
☐ Surety Bond

☐ Bail Not Made ☐ Collateral

☐ Status Changed (See Docket) ☐ 3rd ☐ Other
 Ptry Cust

U.S. TITLE/SECTION

OFFENSES CHARGED

ORIGINAL COUNTS

18:286 Consp. to defraud Internal Revenue Service 1
 18:1341 Mail Fraud 2-6
 26:7206(a) Filing false & fraudulent tax statements with the I.R.S. 7-13

II. KEY DATES & INTERVALS

SUPERSEDING COUNTS

ARREST or

INDICTMENT ☒

ARRAIGNMENT

TRIAL

SENTENCE

U.S. Custody Began

High Risk Date

Information ☐

3-2-77

Trial Set

Voir Dire ☐

Summons Served

Indict. Waived ☐

1st Plea

3-10-77

☒ NG ☐ G ☐ NOL

G. Plea

W/Drawn

Trial Began

5-31-77

First Appearance

In Charging District

Superseding ☐☐ Indict/Info ☐

Final Plea

☐ NG ☐ G ☐ NOL

Trial Ended

6-20-77

Disposition of Charges

6-20-77

☐ Convicted☐ Acquitted☐ Dismissed☐ On Government Motion

On All Charges

On Lesser * Offenses

WOP: ☐ WP

MAGISTRATE

Search Warrant

Issued

Return

Summons

Issued

Served

Arrest Warrant Issued

COMPLAINT ☐OFFENSE
(In Complaint)

DATE

INITIAL/NO.

INITIAL APPEARANCE DATE ☐

PRELIMINARY EXAMINATION

OR

☐ REMOVAL HEARING☐ WAIVED ☐ NOT WAIVED☐ INTERVENING INDICTMENTDate ☐

Scheduled

Date ☐

Held

Tape Number

INITIAL/NO.

OUTCOME

☐ DISMISSED☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.

James P. Lavin
 791-0038

ATTORNEYS

Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

* Show last names and suffix numbers of other defendants on same indictment/information

Mangan, F. -01

DATE

(DOCUMENT NO.)

PROCEEDINGS

EXCLUDABLE DELAY

(a) (b) (c) (d)

3-2-77

Filed Indictment. B/W Ordered. Indictment Ordered sealed.
Frankel, J. *B/W ISSUED.*

3-3-77

Indictment Ordered unsealed.....Frankel, J.

3-10-77

Deft. (no atty present). Court directs a not guilty plea be entered.
 Case assigned to Stewart, J. for all purposes. Bail of
 \$15,000 PRB co-signed by mother & father continued. 10 days
 for motions.....Bryan, J.

3-11-77

Filed the following papers rec'd from Mag Raby #77-240)
 Docket entry sheet-copy of ind.-Warrant for of deft-
 Disposition sheet-Appearance bon dinthe am of \$15,000
 dated 3-3-77

3-22-77

Deft sent to Mag to appoint counsel to defend him. P/C
 conference scheduled for 3-30-77 at 9:30...Stewart, J.

DATE	page 2 (DOCUMENT NO.)	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY				F. Tr otn de Ru &
				Interval Section II (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)	
3-25-77		Filed the following papers rec'd from Mag Sinclair Mag #- CJA Form #23 financial affid-Order appointing counsel Legal Aid Society						A. Exa hea mer phy cap US
3-30-77		Counsel present DEft represented by Jack Lipson LAS Trial scheduled for 5-23-78..... Stewart,J.						B. NAT nat US
4-26-77		Filed deft's affid & notice of motion -The deft adopts by reference the of his co-deft in so far as such motions are relevant or applicable to him,- for a B/P etc						C. Int App
5-5-77		Filed Govt's memorandum of law in opposition to the motions of deft's for discovery & inspection B/P & for a list of witnesses						D. Hea pre
5-13-77		Filed deft's affid & notice of motion for suppression of statements, evidence wiretap etc.- Dismissal of the indictment, severance etc.						E. Tra otn de Ru &
5-16-77		Filed MEMORANDUM DEft has moved for B/P & Discovery-- Part denied & part granted....So ordered Stewart,J. M/N						G. De lic un me up is pe 31
5-20-77		Suppression began....STEWART,J.						H. M pr Pr Pa tic tic
5-23-77		Suppression hearing continued.....STEWART,J.						I. M of or W
5-24-77		" " "						J. T ut in of S
5-25-77		" " "						K. O F N T
5-26-77		" " " Bail limits ext to include the State of Va. for this weekend (5-28-77) only..STEWART						L. P S in ab G
5-31-77		Jury empanelled trial begunSTEWART,J.						M. R D a C S
6-1-77		Trial continued						N. T C W
6-2-77		" "						O. U C S
6-6-77		" "						P. T C W
6-7-77		" "						Q. U C S
6-8-77		" "						R. T C W
6-8-77		" "						S. U C S
6-9-77		" "						T. T C W
6-10-77		" "						U. U C S
6-13-77		" "						V. T C W
6-114-77		" "						W. T C W
6-15-77		" "						
6-16-77		" "						
6-17-77		" "						
6-20-77		Trial continued & concluded DEft GUILTY as charged. PSI ordered Bail continued S _{ent} . adj to 7-26-77 at 10:00 A.M.....STEWART,J.						
6-22-77		Filed Govt's affid in opposition to the various motions of deft filed with this Court Friday 5-13-77						
7-1-77		Filed CJA Form #21 appointing Bernard Abrams as Fingerprint Exam.						
7-1-77		Filed CJA form copy #2 approving payment to Bernard ABrams 1420 Wood Rd Bronx. ,N.Y. dated 6-23-77.....STEWART,J.						
-continued-								

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
	(Document No.)				
7-5-77	Filed CJA form #21 copy 5 appointing Paul Osborne as Handwriting Examiner for deft				
7-5-77	Filed CJA form # 21 copy 2 approving payment for Paul Osborne dated 6-28-77.....STEWART,J.				
7-5-77	Filed CJA foem #20 copy 5 appointing Lawrence Stern as atty for deft				
7-5-77	FiledCJA form #20 copy 2 authorizing payment for L. Stern dated 6-24-77.....STEWART,j.				
7-6-77	Filed envelope)Documents from Suffolk County D.A.) ordered sealed & impoundedSTEWART,J. (placed on cashiers vault)				
7-12-77	Filed Govt's proposed examination of prospective jurors				
7-19-77	Filed Transcript of record of proceedings, dated MAY 20, 23, 24, 25, 26 1977				
7-19-77	Filed Transcript of record of proceedings, dated MAY 31, JUNE 1, 2, 6, 7, 8, 9. 1977				
7-19-77	Filed Transcript of record of proceedings, dated JUNE 10, 13, 14, 15, 16, 17, 20. 1977				
7-26-77	Filed JUDGMENT & COMMITMENT Deft (atty present) The deft is hereby committed to the custody of the Atty General or his authorized representative for imprisonment for a period of ONE (1) YEAR and a DAY on each of counts 1,2,3,4,7,8,&9 Imposition of sentence is suspended on each of counts 5,6, 10,11,12,&13and the deft is placed on probation for a period of THREE (3) YEARS;a condition of probation being that deft participate in a Psychiatric counseling program that the Probation Dept of this Court approves. The sentence imposed on counts 1,2,3,4,7,8 & 9 are to run concurrently with each other & the period of probation is to run consecutivly with the period of incarceration. The deft was advised of his rights to appeal Bail is to continue pending appeal....STEWART,J. Copies issued				
7-26-77	Filed Personal Reg Bond pending appeal in the sum of \$15,000 dated 7-26-77				
7-26-77	Filed notice of appeal from the Judgment of conviction entered on the 26th day of July 1977 (copy mailed to deft's atty & U.S. Atty)				
8-11-77	Filed notice that the original record has been certified & transmitted to the USCA				
8-22-77	Filed transcript record of proceedings dtd: 7/26/77				
8-22-77	Filed notice that the 1st supplemental record on appeal has been certified & transmitted to the USCA				
10-21-77	Filed transcript record of proceedings dtd: March 30, 1977				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
10-21-77	(Document No.) Filed notice that the second supplemental record on appeal has been certified & transmitted to the USCA				
11-10-77	Filed ORDER extending bail -Orderee that drafts bail conditions be extended to permit travel to Denver Colo. . M/N (US Atty notified)				

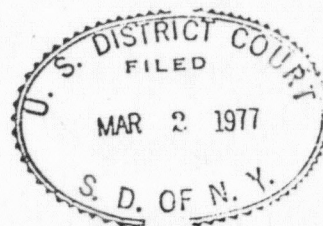
AO 256A

Interval
(per Section II)

Start Date
End Date

Ltr. Total
Code Days

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- x
UNITED STATES OF AMERICA, :

-v- :

FRANK MANGAN and
KEVIN MANGAN, :

Defendants. :

INDICTMENT

77 Cr.

77 CRIM. 0165

----- x
COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of October, 1971, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, FRANK MANGAN and KEVIN MANGAN, the defendants, and other persons to the Grand Jury known and unknown, unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together and with each other to violate Section 286 of Title 18, United States Code.

2. It was part of said conspiracy and an object thereof that the defendants, FRANK MANGAN and KEVIN MANGAN, unlawfully, wilfully and knowingly would and did defraud the United States, and a department and agency thereof, namely, the Internal Revenue Service, United States Department of the Treasury, by obtaining and aiding to obtain the payment and allowance of false, fictitious and fraudulent claims, to wit, false, fictitious and fraudulent claims for individual income tax refunds.

RECEIVED

MAR 4 1977

B 3. It was further a part of said conspiracy and an object thereof that the defendant FRANK MANGAN, being an employee of the Internal Revenue Service (IRS), improperly would obtain from files of the IRS names and social security numbers of legitimate taxpayers and, using the aforementioned names and social security numbers, the defendant FRANK MANGAN, assisted by defendant KEVIN MANGAN, would and did prepare and submit false, fraudulent and fictitious claims for individual income tax refunds, which claims caused the Internal Revenue Service to remit checks in the amount claimed on the false returns and which were mailed to addresses supplied by the defendants.

4. It was further a part of said conspiracy and an object thereof that the defendants FRANK MANGAN and KEVIN MANGAN would and did receive and negotiate the checks issued by the Internal Revenue Service in payment of the false, fraudulent and fictitious claims described above.

OVERT ACTS

In furtherance of the said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. From in or about July 1971 to July of 1972 the defendant FRANK MANGAN, while employed by the Internal Revenue Service as a Special Agent, obtained the following names and Social Security numbers of legitimate taxpayers from the records and files of the Internal Revenue Service:

<u>NAME</u>	<u>SOCIAL SECURITY NUMBER</u>
JOHN McCARTHY	134-14-3963
SCOTT MURPHY	169-42-8399

JOHN McCARTHY	052-03-7261
JOHN McCARTHY	130-26-1053
JOHN McCARTHY	092-12-0561
JOHN McCARTHY	099-05-7576
JOHN McCARTHY	902-08-9214

2. On or about January 12, 1972 the defendant FRANK MANGAN and KEVIN MANGAN prepared and filed with the Internal Revenue Service a false, fraudulent and fictitious 1971 income tax return form 1040 in the name of John McCarthy, Social Security number 134-14-3963 which return claimed a refund due in the amount of 9,421.06, for which a U.S. Treasury Tax refund check was issued by the Internal Revenue Service on February 25, 1972 payable to John McCarthy at 303 West 80th Street, New York, N.Y. in the amount of \$9,421.06.

3. On or about January 22, 1972 the defendants FRANK MANGAN and KEVIN MANGAN prepared and filed with the Internal Revenue Service a false, fraudulent and fictitious 1971 income tax return (Form 1040) in the name of Scott Murphy, Social Security number 169-42-8399 which return claimed a refund due in the amount of \$9421.77, for which a U.S. Treasury tax refund check was issued by the Internal Revenue Service on March 3, 1972 payable to Scott Murphy at 2166 Broadway, New York, N.Y. and in the amount of \$9421.77.

4. On or about January 15, 1972, the defendants FRANK MANGAN and KEVIN MANGAN prepared and filed with the Internal Revenue Service a false, fraudulent and fictitious 1971 income tax return (form 1040) in the name of John McCarthy, Social Security number 052-03-7251, which return claimed a

refund due in the amount of \$9201.12, for which a U.S. Treasury tax refund check was issued by the Internal Revenue Service on March 3, 1972, payable to John McCarthy at 230 West 76th Street, New York, N.Y. in the amount of \$9201.12.

5. On or about January 21, 1972 the defendants FRANK MANGAN and KEVIN MANGAN prepared and filed with the Internal Revenue Service a false, fraudulent and fictitious 1971 income tax return (form 1040) in the name of John McCarthy, Social Security number 130-26-1053, which return claimed a refund due in the amount of 8991.02, for which the Internal Revenue Service issued a U.S. Treasury tax refund check on March 9, 1972 payable to John McCarthy, at 306 West 94th Street, New York, N.Y. in the amount of 8991.02.

6. On or about January 21, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, prepared and filed with the Internal Revenue Service a false, fraudulent and fictitious 1971 income tax return (form 1040) in the name of John McCarthy, Social Security number 092-12-0561, which return claimed a refund due in the amount of \$9044.16, for which the Internal Revenue Service issued a U.S. Treasury tax refund check payable to John McCarthy at 230 West 76th Street, New York, N.Y. in the amount of \$9033.71.

7. On or about January 21, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, prepared and filed with Internal Revenue Service a false, fraudulent and fictitious 1971 income tax return (form 1040) in the name of John McCarthy, Social Security number 099-05-7576, which return claimed a refund due of \$8875.63, for which the Internal Revenue Service issued a U.S. Treasury tax refund check on April 7, 1972, payable to John McCarthy, 306 West 94th Street, New York, N.Y., in the amount of \$8875.63.

8. On or about January 23, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, prepared and filed with the Internal Revenue Service a false, fraudulent and fictitious 1971 income tax return (form 1040) in the name of John McCarthy, 425 West End Avenue, New York, N.Y., Social Security number 902-03-9214, which return claimed a refund due in the amount of \$8872.04.

9. On or about March 1, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, deposited a U.S. Treasury tax refund check in the amount of \$9421.06, payable to John McCarthy of 303 W. 80th Street, New York, N.Y., into a savings account opened under the name of Scott Murphy at the National Bank of Westchester, White Plains, New York.

10. On or about March 8, 1972 the defendants FRANK MANGAN and KEVIN MANGAN, deposited a U.S. Treasury check in the amount of \$9421.77, payable to Scott Murphy of 2166 Broadway, New York, N.Y., into a savings account opened under the name Scott Murphy at the National Bank of Westchester, White Plains, New York.

11. From March 7, 1972 to March 27, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, withdrew approximately \$18,850.00 in cash from the savings account opened in the name of Scott Murphy at the National Bank of Westchester in White Plains, New York.

12. On or about March 14, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, opened an account in the name "McCarthy Enterprises Inc." with a \$4500 cashiers' check drawn on the National Bank of Westchester, White Plains, New York.

18. From on or about March 13, 1972 to April 18, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, withdrew approximately \$22,450.00 in cash from the account of McCarthy Enterprises at the Chase Manhattan Bank, 60 East 42nd Street, New York, N.Y.

19. On or about April 7, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, caused a U.S. Treasury Tax refund check in the amount of \$8,875.73 payable to John McCarthy, to be delivered to 306 W. 94th Street, New York, N.Y. (Title 18, United States Code, Section 286.)

COUNTS TWO THROUGH SIX

The Grand Jury further charges:

On or about each date hereinafter set forth in Counts Two through Six, in the Southern District of New York, FRANK MANGAN and KEVIN MANGAN, the defendants, unlawfully, wilfully, and knowingly did devise and intend to devise a scheme and artifice to defraud and for obtaining money and property from the United States by means of false and fraudulent pretenses, representations and promises namely, that each taxpayer hereinafter set forth in Counts Two through Six had worked for the employers set forth below in 1971, had earned the amount of adjusted gross income from said employers in 1971, and was entitled to the income tax refund hereinafter set forth in Counts Two through Six, and for the purpose of executing said scheme and artifice to defraud and attempting so to do did cause to be placed in post offices and authorized depositories for mail matter by the Internal Revenue Service, and did cause to be delivered by mail, according to the directions thereon, certain mail matter, to wit, envelopes containing Treasury tax refund checks payable to and in the amounts indicated in Counts Two

13. On or about March 8, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, deposited a U.S. Treasury check in the amount of \$9201.12, payable to John McCarthy of 230 West 76th Street, New York, N.Y., into a savings account opened in the name John McCarthy at the National Bank of Westchester, New Rochelle, New York.

14. On or about March 22, 1972 and March 27, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, withdrew \$9,200.00 in cash from the savings account in the name of John McCarthy at the National Bank of Westchester, New Rochelle, New York.

15. On or about March 14, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, deposited a U.S. Treasury check in the amount of \$8991.02, payable to John McCarthy, 306 West 94th Street, New York, N.Y., into a savings account opened in the name of John McCarthy at the Chase Manhattan Bank, Fordham Road, Bronx, New York.

16. On or about April 13, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, transferred \$9,015.68 from the account opened in the name of John McCarthy at the Chase Manhattan Bank, Fordham Road, Bronx, to an account opened in the name of McCarthy Enterprises Inc. at the Chase Manhattan Bank at 60 East 42nd Street, New York, N.Y.

17. On or about March 10, 1972 the defendants, FRANK MANGAN and KEVIN MANGAN, deposited a U.S. Treasury tax refund check in the amount of \$9,033.71, payable to John McCarthy, 230 W. 76th Street, New York, N.Y., into an account opened in the name of McCarthy Enterprises with the Chase Manhattan Bank, 60 E. 42nd Street, New York, N.Y.

through Six, to be sent and delivered by the Postal Service to the address indicated.

NAME, SOCIAL SECURITY NUMBER AND ADDRESS GIVEN ON FORM 1040 TO WHICH REFUND CHECK MAILED	EMPLOYER	CLAIMED ADJUSTED GROSS INCOME	AMOUNT OF REFUND CHECK	APPROXIMATE DATE OF MAILING REFUND CHECK
John McCarthy Soc. Sec. No. 052-03-7261 230 W. 76th Street New York, NY 10023	Atlas Investing Co., Inc.	\$36,807.42	\$9,201.12	March 3, 1972
Scott Murphy Soc. Sec. No. 169-42-8399 2166 Broadway New York, NY 10024	Atlas Investing Co., Inc.	\$31,075.31	\$9,421.77	March 3, 1972
John McCarthy Soc. Sec. No. 130-26-1053 306 West 94th St. New York, NY 10025	Ace Industries Inc.	\$46,192.06	\$8,991.02	March 9, 1972
John McCarthy Soc. Sec. No. 092-120-0561 230 West 76th St. New York, NY 10023	Ace Industries Inc.	\$35,768.00	\$9,033.71	March 10, 1972
John McCarthy Soc. Sec. No. 099-05-7576 306 West 94th St. New York, NY	Admiral Realty Co. Inc.	\$25,848.04	\$8,875.63	April 7, 1972

(Title 18, United States Code, Sections 1341 and 2).

COUNTS SEVEN THROUGH THIRTEEN

The Grand Jury further charges:

On or about the dates hereinafter set forth in Counts Seven through Thirteen, in the Southern District of New York, FRANK MANGAN and KEVIN MANGAN, the defendants, unlawfully, wilfully and knowingly did aid and assist, procure, counsel, advise and cause the preparation and presentation to the

Internal Revenue Service under and in connection with matters arising under the Internal Revenue Laws, to wit, Title 26, United States Code, of the 1971 United States Individual Income Tax Return Form 1040, including the attached wage and Tax Statement, described in each of Counts Seven through Thirteen, which was fraudulent and false as to material matters, including, but not limited to, the facts that the person whose name appeared on each return as the taxpayer did not work in 1971 for the employer named on each return, did not earn the adjusted gross income stated on each return from said employer in 1971, and was not entitled to the income tax refund stated on each return.

<u>COUNT</u>	<u>DATE</u>	<u>NAME & SS# OF TAXPAYER ON FORM 1040</u>	<u>EMPLOYER</u>	<u>ADJUSTED GROSS INCOME</u>	<u>AMOUNT OF REFUND CLAIMED</u>
7	1/22/72	John McCarthy SS# 134-14-3963	Admiral Realty Co. Inc.	\$36,664.39	\$9,421.06
8	1/22/72	Scott Murphy SS# 169-42-8399	Atlas Invest- ing Co., Inc.	\$31,075.31	\$9,421.77
9	1/13/72	John McCarthy SS# 052-03-7261	Atlas Invest- ing Co., Inc.	\$36,807.42	\$9,201.12
10	1/21/72	John McCarthy SS# 130-26-1053	Ace Industries, Inc.	\$46,192.06	\$8,991.02
11	1/21/72	John McCarthy SS# 092-12-0561	Ace Industries, Inc.	\$35,768.00	\$9,044.16
12	1/21/72	John McCarthy SS# 099-05-7576	Admiral Realty Co., Inc.	\$25,848.04	\$8,875.63
13	1/23/72	John McCarthy SS# 902-08-7214	Ace Industries, Inc.	\$26,557.31	\$8,872.04

(Title 26, United States Code, Section 7206(a))

Joseph J. Friedman
Foreman

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

by 16, 1976 Kevin Mangan : Lawrence Stern Esq. present. 244
interest: 1 Yr + 1 day on each of Cts. 1, 2, 3, 4, 7, 8 + 9, to run concurrently
with each other. 3rd on Cts. 5, 6, 10, 11, 12 + 13 & placed on Probation for 3 yrs
condition of Probation being that deft. participate in a psychiatric
counseling program that Probation Dept. of this Court approves.
Bail is to remain \$15,000 P/B and to be re-arrested today.

Frank Mangan: atty. Lawrence Felth Esq. present. Deft.
disturbed 2 yrs on each of Cts. 1 thru 13 inclusive
to run concurrently with each other. Bail to
remain \$15,000 P/B and to be re-arrested today.

Steven O. J. R.

United States District Court
SOUTHERN DISTRICT OF NEW YORK
THE UNITED STATES OF AMERICA

vs.

FRANK MANGAN and
KEVIN MANGAN,

Defendants.

INDICTMENT

18, U.S.C. §§286, 1341
26, U.S.C. §7206(2)

ROBERT B. FISKE, JR.

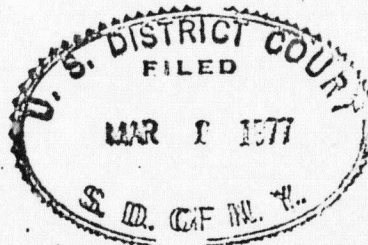
United States Attorney.

A TRUE BILL

Joseph Eldredge

Foreman.

FPI-SS-2-19-71-20M-6950



Warrant ordered for both
defendants. Indictment ordered sealed

March 3, 1977 - Indictment
ordered unsealed. Frank Mangan

March 10, 1977 -- Deft. Frank Mangan
present w/ atty. Leonard Rosenblatt for
arraignment purposes ONLY. Deft. pleads Not
Guilty to Indictment. Case assigned to
Judge Stewart for all purposes. Bail of
\$15,000 P.R.B. co-signed by mother + father
cont'd. 10 Days for motions.

Bryan, J.

March 10, 1977 -- Deft. Kevin Mangan
present (no atty.) Court enters plea of
Not Guilty. Case assigned to Judge
Stewart for all purposes. Bail of \$15,000
P.R.B. co-signed by mother + father cont'd.
10 Days for motions.

Bryan, J.

MAY 22 1977

11/10 conf held. atty Lawrence Feldman
present for deft Frank Mangano. Deft. R
Mangan sent to Magistrate to appoint counsel
to defend him. 11/10 conf scheduled for 3/30
at 9:30.

Stewart, J.

March 30, 1977 - Counsel present. Deft. Kevin Mangano
represented by Jack Lipson (L.A.S.). Trial scheduled
for 5/23/77.

Stewart, J.

May 20 1977 - Both Defts.

MAY 23 1977

Suppression hearing began.

Suppression hearing cont'd.

Stewart, J.

MAY 24 1977

MAY 25 1977

MAY 26 1977

Bail limits ^{extended} for deft Kevin Mangano to
include the State of Virginia - for this (5/24/77)
weekend only.

Stewart, J.

5-31-77 - Both Defts. Jury empaneled trial
began before

Stewart

JUN 1 1977 - Trial cont'd.

JUN 2 1977

JUN 6 1977

JUN 7 1977

JUN 9 1977 - Trial cont'd.

JUN 10 1977

JUN 16 1977

JUN 13 1977 - Trial cont'd.

JUN 17 1977 - Trial cont'd.

JUN 18 1977 - T.C.

JUN 20 1977 - T.C.

JUN 14 1977 - T.C.

JUN 15 1977 - T.C.

Guilty as charged. PSI ordered. Bail cont'd. Ser

Ady'd to July 26, 1977 at 10 A.M.

Stewart

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2 CHARGE OF THE COURT

3 THE COURT: Ladies and gentlemen.

4 We have now come to that part of the case where
5 the evidence is in, the lawyers have presented their arguments
6 and you are about to exercise your role of deciding the facts
7 in this case.

8 Now I am going to give you my instructions as to
9 the law which is applicable to this case.

10 It is your responsibility to reach a fair and just
11 verdict and I know you will deliberate towards reaching your
12 verdict fairly, conscientiously and honestly.

13 I want to impress upon you that you are the sole
14 judges of the facts. You pass on the weight of the evidence,
15 you resolve such conflicts as there may be in the evidence,
16 you draw such reasonable inferences and maybe warranted by
17 the evidence in the case. My function is to instruct you on
18 the law. It is your sworn duty to accept the law as I say it
19 to you, not what the lawyers may have said the law is or any-
20 body else, but what I say to you, and to apply it to the
21 facts as you find the facts to be.

22 With respect to any fact matter, it is your
23 recollection and yours alone that governs. Anything that
24 counsel, either for the Government or for the defendants, may
25 have said with respect to matters in evidence, whether during

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2 the trial or in the arguments, is not to be substituted for
3 your own recollection of what the facts are. Also anything
4 that I may have said as to any matters of evidence is not to
5 be taken in place of your own recollection.

6 You may not take into account anything except
7 the evidence. You may not consider any extraneous matters,
8 such as anything outside this courtroom, in the jury room,
9 anywhere in the courthouse, any other place. Only the evi-
10 dence presented in this courtroom may be considered by you.

11 Although a number of witnesses appear on behalf of
12 the prosecution and a substantial number of documents were
13 introduced into evidence by the prosecution, the mere number
14 of witnesses or quantity of documents has no relation to the
15 burden of proof to which I have alluded and to which I will
16 allude again. It is not to have any effect upon your deliber-
17 ations. Your primary concern is the quality and the nature of
18 the evidence, not the quantity.

19 It is your duty to determine what weight, if any,
20 is to be given to the evidence, and the weight of the evidence
21 is not determined by the number of witnesses or the quantity
22 of the documents.

23 The fact that the Government is a party, that the
24 prosecution is brought in the name of the United States,
25 entitles it to no greater consideration than that which you
will accord to any other party.

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2 By the same token, it is entitled to no less
3 consideration.

4 I want to remind you of certain general principles
5 of law, most of which, if not all of which I have referred to
6 earlier.

7 First, the indictment is only an accusation, a
8 charge. It is not evidence of anything. It is merely a means
9 used by the government to bring a defendant into court,
10 nothing more. And you will give no weight to the fact that
11 an indictment has been returned against these two defendants.

12 The defendants have pled not guilty. Therefore,
13 the government has the burden of establishing and proving
14 beyond a reasonable doubt by competent evidence, the charges
15 made against them. Whether this burden is sustained does not
16 depend on the number of witnesses or the quantity of the
17 testimony, but rather, on the nature and quality of the
18 testimony and other evidence. It is a burden that never
19 shifts. It remains upon the government throughout the trial.

20 A defendant does not have to prove his innocence.
21 On the contrary, a defendant is presumed to be innocent of the
22 charges in the indictment and the government must prove a
23 defendant's guilt beyond a reasonable doubt. This presump-
24 tion of innocence was in the defendants' favor when the trial
25 began, it was present during the trial, it is in the

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2 defendants' favor now, and it continues in the defendants'
3 favor during the course of your deliberations in the jury
4 room. It is removed only if you are satisfied that the
5 government has sustained its burden of proving beyond a
6 reasonable doubt the guilty of the defendant.

7 It is for this reason that a defendant does not
8 need to take the witness stand, and in fact, the defendants
9 in this case have not testified on their own behalf. The
10 Constitution and the laws of the United States provide that
11 in any criminal matter a defendant is under no obligation
12 to come forward to testify, or indeed, to produce any evidence,
13 because the burden of proving a violation is solely and
14 exclusively on the government.

15 So, you are not to draw any inference whatsoever
16 from the fact that the defendants did not testify. And in
17 fact, you must not speculate upon it or consider it in any
18 way in your deliberations.

19 A defendant has the absolute right not to make
20 any defense and to rely upon the government's burden to prove
21 him guilty beyond a reasonable doubt.

22 I have mentioned several times "reasonable doubt."
23 Reasonable doubt is such a doubt as would cause you to hesi-
24 tate to act in a matter of importance in our own lives. It
25 is a doubt which a reasonable person has after carefully

2 weighing all the evidence. Reasonable doubt is one which
3 appeals to your reason, your judgment, your own experience;
4 it is not caprice, speculation, whim. It is not an excuse to
5 avoid the performance of an unpleasant duty.

6 Speculative or imaginary qualms or misgivings are
7 not reasonable doubts. It is not necessary for the govern-
8 ment to prove the guilt of a defendant to a mathematical
9 certainty beyond all possible doubt. It is practically
10 impossible for a person to be absolutely and completely con-
11 vinced of any controverted fact by which its very nature is
12 not susceptible of mathematical certainty.

13 In consequence, the law is that in a criminal case
14 like this one, it is enough if proof that a defendant is
15 guilty is established beyond a reasonable doubt, though not
16 beyond all possible doubt.

17 If, after a fair and impartial consideration of
18 all the evidence in the case, or the lack of it, you can
19 honestly say that you have such a doubt as would cause a
20 prudent person to hesitate before acting in matters of impor-
21 tance to himself, then you have a reasonable doubt, and in
22 that circumstance it is your duty to acquit.

23 On the other hand, if, after a fair and impartial
24 consideration of all the evidence, you can honestly say you
25 have such an abiding conviction of the guilt of the

2 defendants that you would be willing to act upon this
3 conviction in important and weighty matters in the personal
4 affairs of your own life, then you have no reasonable doubt
5 and, in that circumstance, it is your duty to convict.

6 A reasonable doubt may arise not only from the
7 evidence presented but also from the lack of evidence, since
8 the burden, as I have told you, is always on the government
9 to prove the defendants guilty of every essential element
10 of the crime charged beyond a reasonable doubt.

11 The defendants have the absolute right to rely
12 upon the failure of the prosecution to establish every element
13 beyond a reasonable doubt.

14 As I mentioned when the trial began, the charges in
15 this case are contained in a 13-count indictment. Each count
16 charges a separate offense or crime. Each count must be
17 considered separately by you.

18 The indictment names two defendants, Frank L.
19 Mangan and Kevin Mangan. You must determine the guilt or
20 innocence of each defendant separately, with respect to each
21 count of the indictment in which that person is named as a
22 defendant. In making that determination, you must bear in
23 mind that guilt is personal. The guilt or innocence of each
24 defendant before you must be determined separately with
25 respect to each solely on the evidence presented against them
or the lack of evidence. However, as I will explain to you

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2 shortly, in considering the guilt or innocence of each
3 defendant, you may have to determine the nature of the par-
4 ticipation, if any, of the other defendant, or of any indi-
5 vidual claimed to be a co-conspirator.

6 Although there are thirteen counts in this indict-
7 ment, there are only three different types of crimes which
8 are charged against the defendants separately.

9 Count 1 charges the defendants with conspiracy to
10 defraud the government.

11 Let me interrupt myself for a moment.

12 You will be handed a copy of the indictment to take
13 with you when you go into the jury room. So all of what I
14 am telling you about the indictment you will be able to
15 review from the indictment itself.

16 I repeat, Count 1 charges the defendants with
17 conspiracy to defraud the government.

18 Counts 2 through 6 charge the defendants with
19 violations of the mail fraud statute, and Counts 7 through
20 13 charge the defendants with aiding and assisting in the
21 preparation of false income tax returns.

22 Count 1 of the indictment reads as follows:

23 "From on or about the first day of October, 1971,
24 up to the date of the filing of this indictment in the
25 Southern District of New York and elsewhere, Frank Mangan

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2 and Kevin Mangan, the defendants, and other persons to the
3 grand jury known and unknown, unlawfully, wilfully and
4 knowingly did combine, conspire, confederate and agree
5 together and with each other, to violate certain sections of
6 the United States laws. It was part of said conspiracy and
7 an object thereof that the defendants Frank Mangan and Kevin
8 Mangan unlawfully, wilfully and knowingly would and did
9 defraud the United States and a department and agency thereof,
10 namely the IRS, United States Department of the Treasury, by
11 obtaining and aiding to obtain the payment and allowance of
12 false, fictitious and fraudulent claims; that is, false,
13 fictitious and fraudulent claims for individual income tax
14 refunds.

15 "It was further a part of said conspiracy and an
16 object thereof, that the defendant Frank Mangan, being an
17 employee of the IRS, improperly would obtain from files of
18 the IRS, names and Social Security numbers of legitimate
19 taxpayers and using the aforementioned names and Social
20 Security numbers, the defendant Frank Mangan, assisted by
21 Kevin Mangan, would and did prepare and submit false, fraudu-
22 lent and fictitious claims for Internal Revenue income tax
23 refunds, which claims caused the IRS to remit checks in the
24 amount claimed on the false returns and which were mailed to
25 addressees supplied by the defendants.

2 "It was further a part of said conspiracy and an
3 object thereof that the defendants Frank Mangan and Kevin
4 Mangan, would and did receive and negotiate the checks
5 issued by the IRS in payment of the false, fraudulent and
6 fictitious claims described above."

7 The indictment goes on to allege various overt
8 acts, and I will come back to those in a few minutes.

9 The section of the law which the defendants are
10 charged with violating provides in pertinent part that:

11 "Whoever enters into any agreement, combination or
12 conspiracy to defraud the United States or any department or
13 agency thereof, by obtaining or aiding to obtain the payment
14 or allowance of any false, fictitious or fraudulent claim...
15 commits a crime.

16 There are four elements that you must find, each
17 of them beyond a reasonable doubt, in order to find either
18 defendant guilty of conspiracy.

19 First, that some time between October 1, 1971
20 and March 2, 1977, when the indictment was filed, an agree-
21 ment existed among the defendants or between the defendants
22 and another person, other than a government agent.

23 Second, that it was part of this agreement to make
24 false claims upon or against the United States.

25 Third, that the defendant in question, the one

2 whom you are considering, knowingly and wilfully associated
3 himself with the conspiracy; and finally, that any one of
4 the conspirators, whether either of the defendants on trial
5 or any other alleged conspirator, knowingly committed at
6 least one of the overt acts set forth in the indictment, at
7 or about the time and place alleged.

8 Now, the first element. What is a conspiracy?

9 The idea of a conspiracy is very simple. A
10 conspiracy is a combination, an agreement or an understanding
11 of two or more persons, by concerted action to accomplish a
12 criminal or unlawful purpose. In this instance, to make
13 false claims upon or against the United States.

14 The gist of the crime is the unlawful combination
15 or agreement to violate the law. The success or failure of
16 a conspiracy is immaterial to the question of guilt or inno-
17 cence of a conspirator.

18 A conspiracy has sometimes been called a partner-
19 ship for criminal purposes in which every partner becomes the
20 agent of every other partner. However, to establish a
21 conspiracy, the government is not required to show that two or
22 more persons sat around a table and orally, or in writing,
23 entered into a solemn compact stating that they have formed
24 a conspiracy to violate the laws, setting forth details of
25 the plans, the means by which the unlawful project is to be

carried out or the part to be played by each conspirator. Indeed, it would be extraordinary if there were such a formal agreement, either written or oral.

Common sense will tell you that when persons in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. The very nature of a conspiracy calls for secrecy, rendering detection difficult.

Thus, it is sufficient if two or more persons in any manner, through any contrivance, impliedly or tacitly, come to a common understanding to violate the law. Express language or specific words are not required to indicate assent or attachment to the conspiracy. Proof concerning the accomplishment of the goal of a conspiracy may be the most persuasive evidence of the existence of the conspiracy itself. However, even if the conspiracy should fail of its own purpose it is still punishable as a crime.

In determining whether there has been an unlawful agreement or understanding, you may judge acts and conduct of the alleged members of the conspiracy which are done to carry out an apparent criminal purpose. Usually, the only evidence available is only that of disconnected acts on the part of the alleged individual conspirators.

However, these acts and conduct when taken together

2 in connection with each other and with the reasonable
3 inferences flowing therefrom, may show a conspiracy or agree-
4 ment to secure a particular result as satisfactorily and
5 conclusively as more direct proof.

6 If upon such consideration of all the evidence,
7 direct or circumstantial, you find beyond a reasonable doubt
8 that the minds of the alleged conspirators met in any under-
9 standing way and that they agreed, as I have explained a
10 conspiratorial agreement to you, to work together in further-
11 ance of the unlawful scheme alleged in the indictment, then
12 proof of the existence of the conspiracy is established.

13 As to the second element, you must find that
14 it was part of this agreement to make false claims upon or
15 against the United States.

16 The government must establish beyond a reasonable
17 doubt that the purpose of this particular conspiracy was to
18 defraud the United States or any agency or department thereof
19 by obtaining or aiding to obtain the payment or allowance of
20 any false, fictitious or fraudulent claim.

21 With regard to the latter, a tax return is a
22 claim within the meaning of the statute and I also charge you
23 that as a matter of law the Internal Revenue Service is an
24 agency or department of the United States.

25 If you determine beyond a reasonable doubt that a

conspiracy as charged existed, you must next decide the third element; that is, that the defendant knowingly and wilfully associated himself with the conspiracy.

You will recall that this requires the government to establish that the defendant whom you are considering participated in the conspiracy with knowledge of its unlawful purpose and in furtherance of its unlawful objectives.

To determine a defendant's membership in a conspiracy you must consider, on all the evidence and reasonable inferences to be drawn therefrom, whether he knowingly and intentionally participated in it.

In determining whether a defendant was a member of a conspiracy as charged, you may consider all of the evidence before you relating to that defendant and that conspiracy, including the acts and declarations of others you find to be members of the same conspiracy in which it is alleged the defendant participated, if the acts and declarations were in furtherance of the conspiracy and committed during the course of the conspiracy.

Thus, a defendant's mere knowledge of the existence of a conspiracy or of any illegal act on the part of an alleged conspirator, or his -- let me start that again.

Thus, a defendant's mere knowledge of the existence of a conspiracy or of any illegal act on the part of

an alleged conspirator or his friendship or family relationship or mere association with one or more alleged conspirators, is not sufficient to establish his membership in the conspiracy. The government must establish beyond a reasonable doubt that the defendant you are considering was aware of the conspiracy's basic purpose and object, and that he entered into the conspiracy with a specific criminal intent; that is, a purpose to violate the law.

On the other hand, to become a member of a conspiracy, a defendant need not know all the other members of the conspiracy, nor be fully informed as to all the details of the conspiracy. Each member may perform separate and distinct acts, and at different times. Some conspirators may play major roles, while others play minor parts.

But if a defendant, with understanding of the unlawful character of the conspiracy, intentionally engaged, advised or assisted for the purpose of furthering the illegal undertaking, he thereby becomes a knowing and wilful participant.

Knowledge and intent obviously exist in the mind. It is not possible to look into one's mind to see what went on. So, the only way that you have for arriving at a decision concerning these questions, is for you to take into consideration all the facts and circumstances shown by the

evidence and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

You will note that I have used the terms "unlawfully, wilfully and knowingly." They mean that you must be satisfied beyond a reasonable doubt that the defendant knew what he was doing and that he did it deliberately and voluntarily, and not because of some mistake, accident, carelessness, inadvertence, coercion or some other innocent reason.

It is not necessary, of course, that the defendant knew he was violating any particular law. It is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his acts.

Once you have found a conspiracy to exist, and that the defendant knowingly participated in it, the extent of his individual participation has no bearing on his guilt or innocence. The guilt of a conspirator is not measured by the extent, or the duration, of his participation. Even if he participated in it to a degree more limited than that of the other co-conspirators, he is equally culpable so long as he was in fact a conspirator.

2 I want to caution you again, here, that mere
3 association or family relationship does not make one a
4 member of the conspiracy, nor is knowledge without partici-
5 pation, sufficient. Nor is knowledge of, or presence at,
6 the commission of a crime, without more sufficient to make a
7 defendant a conspirator. What is necessary is that the
8 defendant participated with knowledge of at least some of
9 the purposes of the conspiracy and with intent to aid in the
10 furtherance of its unlawful ends.

11 When people enter into a conspiracy to accomplish
12 an unlawful end, they become agents for one another in
13 carrying out the conspiracy. Hence, the acts or declarations
14 of one conspirator in the course of the conspiracy, and in
15 furtherance of the common purposes, are deemed to be the acts
16 of all, and all are responsible for such acts.

17 Accordingly, if you find, in accordance with these
18 instructions that the alleged conspiracy existed, and that
19 the defendant who you are considering was a participant in
20 it, then acts done, and statements and declarations made in
21 furtherance of the conspiracy by any other person found by
22 you to have been a member of the conspiracy, may be considered
23 against the defendant.

24 Even though such acts or declarations were made in
25 the absence and without the knowledge of this defendant.

It is important that this principle applies only to acts and declarations done or made during the continuance of the conspiracy and in furtherance thereof. It does not apply to acts or declarations which do not have these characteristics.

The indictment charges that the conspiracy existed from on or about the first of October, 1971 up to and including the date of the indictment, March 2, 1977. It is not essential that the government prove that the conspiracy started and ended on or about these specific dates. It is sufficient if you find that in fact a conspiracy was formed and existed for some time within the period set forth in the indictment and that at least one of the overt acts which I am just about to come to, was committed in furtherance thereof, within that period.

I have already mentioned that the fourth essential element of the crime of conspiracy is that an overt act, intended to effect the object of the conspiracy, has been committed by at least one of the co-conspirators of the unlawful agreement has been made.

An overt act is a step, a statement, an action or conduct which is taken to achieve or further the objective of the conspiracy. The overt act need not be criminal, nor the very crime which is the object of the conspiracy. Thus,

2 the overt acts listed in the indictment are not necessarily
3 by themselves criminal or illegal.

4 If you find that any of these acts were committed
5 by a conspirator for the purpose of advancing the unlawful
6 enterprise, regardless of whether it was an act by which
7 itself would be innocent, then the overt act requirement has
8 been satisfied.

9 I am not going to read all of the overt acts set
10 forth in the indictment. You can read them for yourself.
11 But I will you a few of them so you will understand what I
12 am talking about:

13 "1. From in or about" -- this is the first
14 overt act -- "From in or about July 1, 1971 to July of 1972,
15 the defendant Frank Mangan, while employed by the IRS as a
16 special agent" -- the indictment says "special agent." As
17 you heard the testimony, he was not a special agent. He was
18 a revenue agent. Going back.

19 "The defendant Frank Mangan, while employed by the
20 IRS as a revenue agent, obtained the following names and
21 Social Security numbers of legitimate taxpayers from the
22 records and files of the IRS."

23 And then it lists seven names, six of which are
24 John McCarthy and one of which is Scott Murphy, and opposite
25 each name is a Social Security number.

"2. On or about January 12, 1972, the defendants Frank Mangan and Kevin Mangan prepared and filed with the IRS a false, fraudulent and fictitious 1971 income tax return form 1040 in the name of John McCarthy, Social Security number" -- and then it gives the number -- "which return claimed a refund due in the amount of \$9,421.06 for which a U.S. Treasury tax refund check was issued by the IRS on February 25, 1972 payable to John McCarthy at 303 West 80th Street, New York, New York, in the amount of \$9,421.06."

I will skip down to overt act number 9.

"On or about March 1, 1972, the defendant Frank Mangan and defendant Kevin Mangan deposited a United States Treasury refund check in the amount of \$9,421.06 payable to John McCarthy of 303 West 80th Street, New York, New York, into a savings account opened up in the name of Scott Murphy at the National Bank of Westchester, White Plains, New York."

I will skip to paragraph 17.

"On or about March 10, 1972, the defendants Frank Mangan and Kevin Mangan deposited a United States Treasury refund check in the amount of \$9,033.71 payable to John McCarthy, 230 West 76th Street, New York, New York, into an account opened in the name of McCarthy Enterprises, with the Chase Manhattan Bank, 60 East 42nd Street, New York, New York."

And as I have indicated, there are several others

1 listed in the indictment that you may read when you have
2 the indictment in the jury room.

3
4 It is not necessary for the government to prove
5 that all the members of the conspiracy committed or partici-
6 pated in a particular overt act, since the act of any one
7 done in furtherance of the conspiracy becomes the act of all
8 the other members.

9 Also, the government is not required to prove
10 each of the overt acts. It is sufficient if it proves the
11 commission of at least one of the overt acts at or about the
12 time alleged.

13 Turning to what we call the mail fraud counts,
14 Counts 2 through 6, the statute -- first, I will read you the
15 indictment. On or about each date hereinafter set forth in
16 Counts 2 through 7 in the Southern District of New York, Frank
17 Mangan and Kevin Mangan, the defendants, unlawfully, wilfully
18 and knowingly did devise and intend to devise a scheme or
19 artifice to defraud and for obtaining money and property from
20 the United States by means of false and fraudulent pretenses,
21 representations and promises, namely that each taxpayer
22 hereinafter set forth in Counts 2 through 6 had worked for
23 the employer as set forth below in 1971, had earned the
24 amount of adjusted gross income from said employers in 1971,
25 and was entitled to the income tax refund hereinafter set

forth in Counts 2 through 8; and for the purpose of executing said scheme and artifice to defraud and attempting to do so, it caused to be placed in Post Offices on authorized depositors, mail matter by the IRS, and did cause to be delivered by mail according to the directions thereon, certain mail matter, to wit, envelopes containing Treasury tax refund checks payable to, and the amounts indicated in Counts 2 through 6 to be sent and delivered by the Postal Service to the addressee indicated.

There then follows a table containing Counts 2 through 6, the portion which I have just read being part thereof.

Count 2 and each of them is similar, lists the name, Social Security number, and address given on Form 1040 to which the refund check was mailed.

In Count 2 it is John McCarthy. Then the Social Security number and the address in New York. The employer, Atlas Investing Company, Inc. It claimed adjusted gross income, \$36,807.42. The amount of the refund check, \$9,201.12, and the final column, the approximate date of mailing of the refund check, March 3rd, for Count 2, March 3, 1972.

Counts 3, 4, 5 and 6 are similar except with different dates and different Social Security numbers. And also different employers.

2 The statute in question reads:

3 "Whoever, having devised or intending to
4 devise any scheme or artifice to defraud, or for obtaining
5 money or property by means of false or fraudulent pretenses,
6 representations or promises... for the purpose of executing
7 such scheme or artifice or attempting so to do...causes to
8 be delivered by mail according to the direction thereon, or
9 at the place at which it is directed to be delivered by the
10 person to whom it is addressed, any such matter or thing..."
11 commits a crime.

12 To establish that either of the defendants is
13 guilty of the crimes charged in Counts 2 through 6, the
14 government must prove beyond a reasonable doubt each of the
15 following three elements:

16 First: That the defendant devised or intended to
17 devise a scheme or artifice to defraud or to obtain money by
18 false and fraudulent pretenses.

19 Second: That the defendant knowingly and wilfully
20 participated in the scheme or artifice to defraud, with
21 knowledge of its fraudulent nature and with the intent to
22 defraud.

23 Third: That for the purpose of executing the
24 scheme or artifice to defraud the defendant used or caused
25 another to use the mails.

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3 Now, the first element is the existence of a
4 scheme to defraud or to obtain money by means of false
5 representations.

6 A scheme or an artifice is merely a plan for the
7 accomplishment of an object. A scheme to defraud is any
8 plan, device or course of action to obtain money or property
9 by means of false or fraudulent pretenses, representations
10 or promises calculated to deceive the person or agency to
11 which such pretenses, representations or promises are made.
12 So, it embraces any scheme, any trick, any device or deceit
13 intended to deprive a person of his money or property, or an
14 agency of the government of money or property by false
15 pretenses or representations.

16 A statement, representation, claim or document is
17 false if untrue when made and was then known to be untrue by
18 the person making it or causing it to be made.

19 The deception need not be premised upon verbalized
20 words alone. The arrangement of the words or the circumstance
21 in which they are used may convey the false and deceptive
22 appearance.

23 If there is deception, the manner in which it
24 is accomplished is immaterial.

25 In this case, the government has alleged in the
paragraph which precedes each series of mail fraud counts the

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means by which the defendants separately committed the scheme
to defraud.

Because the crime is the devising and execution of
a scheme to defraud and not its success, it is not necessary
that you find the defendant you are considering realized any
gain from the scheme. Nor is it necessary for the govern-
ment to establish that the intended victim, here the Internal
Revenue Service, suffered any loss, although it does contend
the proof establishes that the Internal Revenue Service was
defrauded and that the defendants profited.

While the government has the burden of proving
the essential elements of the scheme to defraud, it is not
required to prove that every step of the scheme was accom-
plished. The crime is complete when the scheme is conceived
and the mails are used in an attempt to execute it.

The second element , that the government must prove
beyond a reasonable doubt in order to convict the defendant
named therein is that he knowingly and wilfully participated
in the scheme or artifice to defraud and with intent to
defraud.

"Knowingly" means to act purposely and deliberately,
rather than through mistake, inadvertence or other innocent
reason.

"Wilfully" means to act intentionally and deliber-
ately with a bad purpose.

2 "Intent to defraud" means to act knowingly and
3 with the specific intent to deceive for the purpose of either
4 causing some financial gain to one's self.

5 Under these fraud statutes, even false represen-
6 tations or statements or omissions of material facts do not
7 amount to a fraud unless done with fraudulent intent.

8 However misleading or deceptive a plan may be, it is
9 not fraudulent if it was devised in good faith. Honesty
10 and good faith on the part of a defendant is always a good
11 defense to the charges in these counts. An honest belief in
12 the truth of the representations made by a defendant is a
13 good defense, however inaccurate the statements may turn out to
14 be.

15 As a practical matter then, in order to sustain
16 the charge against each defendant, the government must estab-
17 lish beyond a reasonable doubt that the defendant knew that
18 his conduct and participation in the scheme as alleged was
19 calculated to deceive the IRS and the federal government in
20 general, and nonetheless he associated himself with the al-
21 leged fraudulent scheme.

22 Intent to defraud involves the state of a
23 persons' mind, the purpose with which he acted at the time the
24 acts in question occurred. It is obviously impossible to
25 ascertain directly the operation of a defendant's mind, because

2 you cannot look into a person's mind and see what his
3 intentions are or were. And as I have just told you, you
4 may consider the circumstances surrounding the transaction in
5 determining whether or not the defendant acted wilfully and
6 with intent to defraud. You are entitled to consider any
7 statement made and act done or omitted by the defendant and
8 all facts and circumstances in evidence which may aide you
9 in determining his state of mind.

10 As I have already instructed you, while the success
11 of the scheme is not an element of the crime, proof that the
12 IRS was victimized by the fraud and paid over sums of money
13 under the scheme make circumstantial evidence of a schemer's
14 intent.

15 So the question is:

16 Did the defendant wilfully and knowingly devise
17 or enter into a scheme to defraud and to obtain money and
18 property in which the mails were used to further the scheme.
19 If you find that there was such a scheme and the defendant
20 participated in it, then whether or not the scheme succeeded
21 is of no consequence to your determination of whether it
22 existed.

23 The third element is the use of the mails. Before
24 a defendant may be found guilty of these Counts 2 through 6,
25 the government must prove beyond a reasonable doubt the use

of the mails in furtherance of his scheme to defraud. Here the government relies on various mailings which have been introduced in evidence, namely the mailings of the tax returns to the IRS. It is not necessary to show that a defendant in question actually mailed any of the items referred to. This is not required, nor is it necessary that the scheme contemplated the use of the mails. It is sufficient if you find that the defendant caused the mailing by others.

This does not mean that the defendant himself or herself specifically authorized others to do the mailing. Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use of the mails can reasonably be foreseen, even though not actually intended, then he or she causes the mails to be used.

With respect to the use of the mail counts, the government must establish beyond a reasonable doubt that the particular mailing charged in each count occurred during the existence of the scheme and in its furtherance. The government need not prove that the mailing occurred on the exact date alleged in the indictment.

The government also relies as well for Counts 2 through 6 on the aiding and abetting statute.

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2 I instruct you that, it is not necessary for the
3 government to show that the defendant physically committed
4 the offense charged in Counts 2 through 6 himself. The
5 statute provides that a person who aids, abets, counsels,
6 commands, induces or procures the commission of an offense
7 against the United States is as equally punishable as the
8 person who commits the offense directly himself.

9 This means that if you find the defendant aided or
10 abetted another to commit a crime, you must find that the
11 defendant in some way associated himself with the criminal
12 venture, that he participated in it as in something he
13 wished to bring about or, in other words, that he sought by
14 his action to make it succeed.

15 To find a defendant guilty of aiding and abetting
16 you must, of course, find something more than mere knowledge
17 on his part that a crime was being committed, for a mere
18 spectator at a crime is not a participant. But, in order to
19 convict, it is not necessary that you find that the defendant
20 himself did any of the acts since participation in the crime
21 can, for example, be found if you find the defendant induced
22 or aided another person to commit the crime. Thus,
23 participation by the defendant may be shown by any act which
24 you find was committed by the defendant and which involved
25 his participation in the crime.

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2 In Counts 7 through 13, the last group of charges
3 in the indictment, the statute -- first I will read the
4 indictment:

5 On or about the dates hereinafter set forth in
6 Counts 7 through 13 in the Southern District of New York,
7 Kevin Mangan and Frank Mangan, unlawfully, wilfully and
8 knowingly did aid, assist, procure, counsel, advise and
9 cause the preparation and presentation to the IRS under the
10 Internal Revenue laws of the 1971 United States individual
11 income tax return, Form 1040, including the attached wage
12 and tax statement described in each of Counts 7 through 13,
13 which was fraudulent and false as to material matters,
14 including but not limited to the facts that the person whose
15 name appeared on each return as a taxpayer did not work in
16 1971 for the employer named on each return; did not earn the
17 adjusted gross income stated on each other than for said
18 employer in 1971, and was not entitled to the income tax
19 refund stated on each return.

20 And again, as was the case with Counts 2 through 6,
21 Counts 6 and 10 list the dates of the filing of the return,
22 the name of the taxpayer on the return, the employer, the
23 adjusted gross income, and the amount of refund claimed in
24 each of the seven cases.

25 The statute provides:

2 "Any person who... wilfully aides or assists in,
3 or who procures, counsels, or advises the preparation or
4 presentation under, or in connection with any matter arising
5 under, the Internal Revenue laws, of a return, which is
6 fraudulent or is false, such falsity or fraud is with the
7 knowledge or consent of the person authorized or required to
8 present such return...." commits a crime.

9 There are three elements involved, each of which
10 the government must prove beyond a reasonable doubt:

11 First: That the defendant aided or assisted in,
12 or procured, or counseled or advised in the preparation or
13 presentation of the income tax return in that count.

14 Second: That the defendant knew the income tax
15 return described was fraudulent or false as to some material
16 matter.

17 Third: That the defendant acted wilfully.

18 As to the first element, that the defendant aided
19 or assisted in, or procured, or counseled or advised the
20 preparation or presentation of the income tax return. These
21 words have their ordinary, everyday meaning. "Procures,"
22 a word which you may not be familiar with, means: Initiating
23 a proceeding, causing something to be done.

24 As to the second element, that the defendant knew
25 the income tax return described was fraudulent or false as to

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2 some material matter.

3 A "false" tax return is a return that was untrue
4 when made, and was then known to be untrue by the person
5 making it, or causing it to be made.

6 A "fraudulent" tax return is a return made or
7 caused to be made with the intent to deceive.

8 I charge you as a matter of law that statements
9 on Federal income tax return concerning the name of the
10 taxpayer, the source of his income, the amount of income,
11 as well as statements covering deductions and exemptions
12 are material matters within the meaning of the false prepara-
13 tion law.

14 In this case, the government claims that each of
15 the tax returns was totally false and fictitious in that
16 the taxpayers named on the returns had never worked for the
17 employers listed on those returns, and had no knowledge of
18 the filing of the returns.

19 For purposes of this statute, it doesn't matter
20 if the person for whom it is alleged the defendant prepared
21 the return knew of the alleged falsity or fraud or not, nor
22 does it matter whether that person consented to it or not.
23 Rather, this particular statute is designed to include in
24 its scope people who knowingly assist in the preparation and
25 presentation of a false return.

I also instruct you that it is not an element of the offense here charged that the government relied on an alleged false statement or that an audit of the return would have materially affected the tax liability.

Now, a number of more general rules.

There are two types of evidence on which a jury may properly rely in deciding guilt or innocence. I want to make sure that you understand what these two types of evidence are.

Direct evidence is where a witness testified to what he or she saw, heard or observed or he or she knows of his or her own knowledge, something which comes to him or her by virtue of his or her senses.

Circumstantial evidence is evidence of facts or circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of the other facts.

I will give you a simple example of circumstantial evidence:

Assume that when you entered the courthouse this morning the sun was shining, it was a nice day. Also assume that in this courtroom the blinds are drawn, the drapes are drawn, and you cannot look outside.

As you are sitting here, somebody walks in with an umbrella which is dripping wet and somebody else walks in in a raincoat which is also dripping wet. Now, you cannot look out of the courtroom and you cannot see whether or not it is in fact raining, but the combination of the facts which I have just asked you to assume, it would be reasonable and logical for you to conclude that it has been raining.

That is all there is about circumstantial evidence. You infer on the basis of reason and experience from an established fact the existence of some other fact.

Circumstantial evidence is of no less value than direct evidence, for as a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

In addition, there are times when different inferences may be drawn from a certain set of facts. An inference is a deduction or a conclusion which the jury is permitted to draw from facts which have been established by either direct or circumstantial evidence in the case. But an inference is not drawn by speculation or guesswork, but, rather, must be arrived at by an exercise of your reason and common sense.

So, while you are considering the evidence presented, you are permitted to draw from the facts which you find to have been proven, such reasonable inferences as seem justified in the light of your experience.

As jurors, you are the sole judges of the credibility and the truthfulness of each witness. In weighing the testimony of each witness, including an expert witness, you should consider his relationship to the government, the extent of the witness' interest in the outcome of the case, his manner of testifying, his appearance and conduct while on the witness stand, his intelligence, the strength or weakness of his recollection, and the extent to which he has been corroborated or contradicted, if at all, by the other credible witnesses, and evidence.

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2 The ultimate question for you to decide is, did
3 the witness tell the truth? And to this end you are to use
4 your everyday common sense.

5 Because a witness may be a Government employee
6 does not mean that his or her testimony is deserving of any
7 special consideration or any greater weight by reason of that
8 fact and, by the same token, to no lesser consideration.

9 If you find that any witness has deliberately
10 testified falsely as to any material fact, you may disregard
11 all of his testimony or you may accept that part of the
12 testimony which you believe is truthful.

13 You have heard the testimony of an alleged
14 accomplice, John Bertsch. An accomplice is one who unites
15 with another person in the commission of a crime, voluntarily
16 and with common intent.

17 The fact that such an individual is called an
18 accomplice does not permit you to infer that a crime actually
19 has been committed or that the defendants participated
20 in the alleged crime. The term accomplice is simply a
21 description of a witness who claims to have been part of an
22 alleged crime.

23 You must realize, I am sure, that in the prose-
24 cution of a crime the Government frequently decides that it
25 is necessary or desirable to use witnesses who are accom-

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2 plices, such as has been done in this case.

3 John Bertsch, who testified before you, is not
4 named as a defendant, but he's alleged to have been a con-
5 spirator. Under Federal law there is no requirement that the
6 testimony of an accomplice be corroborated. A conviction
7 may rest upon the uncorroborated testimony of an accomplice
8 if you find it credible.

9 However, the testimony of an accomplice should
10 be viewed with great caution and scrutinized carefully. In
11 accessing the credibility of an accomplice, as with that of
12 any witness, you may consider any interest in the outcome of
13 the case. You may consider evidence as to any benefit the
14 witness expects to derive or has derived from his testimony
15 or evidence as to a motive to place responsibility on others.

16 If you find that the testimony of an alleged accom-
17 plice was untruthful as to any material fact, you may dis-
18 regard all of his testimony or you may accept that part of
19 the testimony which you believe is truthful.

20 If upon a careful and cautious examination you are
21 satisfied that the witness has given a substantially truthful
22 version of events to which he testified, such testimony may
23 be given appropriate consideration, together with all the other
24 evidence in the case in determining the guilt or innocence of
25 the defendants.

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2 However, as I have stated many times, the Govern-
3 ment must prove a defendant's guilt beyond a reasonable doubt.

4 The rules of evidence ordinarily do not permit
5 witnesses to testify as to opinions or conclusions. An
6 exception to this rule exists as to those whom we call expert
7 witnesses. Witnesses who by education and experience have
8 become expert in some art, science, profession or calling
9 may state an opinion as to relevant and material matters in
10 which they profess to be expert, and may also state their
11 reasons for the opinion.

12 In this case you heard the testimony of two
13 handwriting and two fingerprint experts. The testimony of an
14 expert witness is offered by a party as an aid to you in your
15 consideration of the evidence.

16 You, however, and not the witness, are the judge
17 of the facts. You must examine all the evidence in the case,
18 including the evidence which forms the basis, if any, for
19 the opinion of an expert.

20 Where, as in this case, the question of whose
21 handwriting appears on certain documents is in issue, any
22 proved handwriting of a person may be received in evidence
23 to be used as a specimen for comparison with the handwriting
24 in dispute. It is for you to determine whether the hand-
25 writing specimens of a defendant which are admitted in evidence

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2 has been proved by the Government to be, in fact, that
3 defendant's handwriting.

4 You should consider each expert opinion received
5 in this case and give it such weight as you may think it
6 deserves. If you should decide that the opinion of an expert
7 witness is not based upon sufficient education or experience,
8 or if you should conclude that the reasons given in support
9 of the opinion are not sound, or that the opinion is outweighed
10 by other evidence, or if you cannot conclude from the evidence
11 presented whether or not the opinion is sound, you may dis-
12 regard the opinion entirely.

13 If you cannot satisfy yourselves beyond a rea-
14 sonable doubt that the reasons or basis for an expert's opinion
15 are supported by the evidence, you may reject that opinion.
16 But if you find that his opinion is supported by the evidence
17 beyond a reasonable doubt, then you may accept it.

18 There is evidence in this case that the defendant
19 Kevin Mangan used the name James Morrow. If there is no
20 showing of an intent to deceive or mislead, it is not in
21 itself unlawful under State or Federal law for a person to
22 make use of a fictitious or assumed name.

23 You have heard some testimony about the statute
24 of limitations. The indictment in this case was filed, as
25 you know, on March 2, 1977. Under the crimes charged in

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2 count 1, the conspiracy count, and counts 2 through 6, the
3 separate mail fraud counts, the statute of limitations
4 requires that the indictment be filed within five years of
5 the alleged crime.

6 As to count 1, therefore, the last day on which
7 the indictment could be filed is April 13, 1977, which, as
8 you will see from the indictment, is the date of the latest
9 overt act alleged.

10 In counts 2 through 6, the last date is the mail-
11 ing of the refund check, and as you will see from the indict-
12 ment, the last date for the filing of an indictment is March
13 3, 1977 for counts 2 and 3, March 9, 1977 for count 4, March
14 10, 1977 for count 5 and April 7, 1977 for count 6.

15 In counts 7 through 13, the income tax counts,
16 the statute of limitations is six years and the last date
17 for each of those seven counts would be sometime in January
18 1978.

19 Under your oath as jurors you are not to be
20 guided or swayed in any manner by sympathy in your delibera-
21 tions or discussions. You are to be guided solely by the
22 evidence in the case. The crucial hard-core question that
23 you must ask yourselves as you sift through the evidence is:
24 what is the truth?

25 It is your task to find out what the truth is and

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2 justice triumphs only if you do so.

3 You are to determine the guilt or innocence of
4 these defendants solely on the basis of the evidence or lack
5 of evidence before you and subject to the law as I have charged
6 you.

7 If you have a reasonable doubt as to a defendant's
8 guilt, you should not hesitate for any reason to find a
9 verdict of acquittal.

10 But, on the other hand, if you should find that
11 the Government has met its responsibility in proving a
12 defendant's guilt beyond a reasonable doubt, you should not
13 hesitate because of sympathy or any other reason to render
14 a verdict of guilty.

15 A few final instructions.

16 During a trial from time to time there have been
17 objections made by one or the other of the parties. It is the
18 duty of a lawyer, as I am sure you recognize, to object when
19 he believes he should, and you should not be prejudiced in any
20 way against anybody because of an objection made or because
21 of my ruling on an objection.

22 Under your oath as jurors, and as I told you at
23 the outset, you cannot allow a consideration of the punish-
24 ment which may be inflicted upon a defendant, if convicted,
25 to influence your verdict in any way or to enter into your

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2 deliberations. The duty of imposing sentence rests exclusive
3 with me. Your function is to weigh the evidence and deter-
4 mine guilt or innocence solely on the basis of the evidence and
5 the law as I have given it to you.

6 You must not be influenced by any assumption,
7 conjecture or sympathy or any inference not warranted by the
8 facts.

9 The purpose of your deliberations is to exchange
10 views with your fellow jurors, to discuss and consider the
11 evidence, to listen to each other's arguments, to present
12 your own views, to reach a unanimous verdict as to the evi-
13 dence based solely on the evidence, and any verdict which you
14 must reach must be unanimous, if you can do so without vio-
15 lence to your own individual judgment.

16 Each of you must decide the case for yourselves,
17 but do so only after an impartial consideration of the evidence
18 in the case and after a discussion with your fellow jurors.

19 Do not hesitate to re-examine your views and to
20 change your opinion when after a discussion it appears that
21 you are in error. But if after carefully considering all of
22 the evidence in the case and after considering the arguments
23 your fellow jurors you still have a conscientious view which
24 differs from the rest of the jury, you are not to yield your
25 view simply because you are out-numbered.

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If in the course of your deliberations you wish to examine any of the exhibits, you wish to have any of the test: y read back to you or if there's anything else which you need from me, Miss Purdy, please hand a note to the marshal and we will do everything we can to help you.

In communicating with me, Miss Purdy, please remember do not in any way indicate to me what your vote at the moment might be. Remember, you must deal with each count separately as to each defendant separately, and any verdict which you return must be unanimous.

Counsel.

MR. FELD: I have nothing, your Honor.

MR. STERN: Nothing, your Honor.

MR. LAVIN: Nothing, your Honor.

THE COURT: All right.

Ladies and gentlemen, let me remind you that your oath sums up your duty: Without fear or favor to anyone, you will truly try the issues between these defendants and the Government based solely upon the evidence and my instructions as to the law. This is important. It is important to the Government, it is important to the defendants.

All right, ladies and gentlemen.

(Marshal sworn.)

THE COURT: All right, ladies and gentlemen, the

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2 marshal will take you out to dinner. You may, of course,
3 now discuss the case among yourselves, but only when all
4 12 of you are present in the jury room.

5 In other words, you may not discuss the case out-
6 side of the jury room, while you are at dinner, on your way
7 to or from dinner. Have a nice dinner.

8 JUROR NO. 7: I wasn't able to reach my wife by
9 telephone. Will I be able to use it?

10 THE COURT: Yes, you can all use the telephone.
11 Miss Purdy, remember when you come back from dinner, wait
12 until all 12 of you are assembled in the jury room, then you
13 can start your deliberations.

14 (At 6:15 p.m. the jury left the courtroom.)

15 (At 8:30 p.m. a note was received from the jury.)

16 (In open court, jury absent.)

17 THE COURT: I had the limosines ordered and they
18 are already here. I didn't expect them this early. They are
19 already here. My thought was they would want to go home
20 pretty soon. I now have a note which reads as follows. It is
21 headed, "Evidence."

22 "Tax forms, 1 to 7-scheme."

23 I take it that means Exhibits 1 through 7.

24 "F. Mangan's tax returns."

25 I guess we know what those are.

1 gawe 10

2 "Income tax checks."

3 I guess they mean the refund checks.

4 "Kevin and Frank exemplars."

5 Were there exemplars from both of them?

6 MR. LAVIN: Yes, your Honor.

7 THE COURT: And finally, this is what it says --
8 I don't know whether Mr. Caputo could help me with this or
9 not -- "Personal check- Amer. Bank witness."

10 I assume they want all the personal checks of
11 American Bank witness.

12 My notion is to let them have this stuff now and
13 let them work for a little bit longer.

14 MR. STERN: That's fine. If the exemplars go
15 in, I would ask that the models for the exemplars go with
16 them.

17 MR. LAVIN: I object. They didn't ask for the
18 models.

19 THE COURT: I am just going to stick with this.
20 If they wanted models, they would ask for them.

21 MR. STERN: I'm not sure they understand that the
22 models go with those things.

23 THE COURT: I don't see why they need the models
24 with the exemplars. Can I see the models?

25 MR. LAVIN: There's no way of telling, Judge, who

1 gawe ll

2 wrote the models or who wrote the exemplars.

3 THE COURT: What are the models?

4 MR. LAVIN: They are the things that the agents
5 prepared so the managers could copy what was on them.

6 MR. STERN: The models explained --

7 THE COURT: May I see the models?

8 (Hanging.)

9 THE COURT: And the exemplars.

10 (Hanging.)

11 THE COURT: I don't think they need the models.

12 They certainly haven't asked for them. I don't want to start
13 giving them things that we think they might want. I don't
14 know where we would cut it off. It isn't clear to me at all
15 that they need the models.

16 MR. STERN: The models explain what is on --
17 at least as far as Kevin Mangan is concerned, that the
18 instructions for what he was supposed to do --

19 THE COURT: But he's done it. If they write
20 John McCarthy, 9201.12 ten times, I don't think that helps.

21 MR. LAVIN: They didn't ask for the exhibit. I
22 don't think you can send them anything they didn't ask for.

23 MR. STERN: There is a big issue as to the direc-
24 tions that everything given pursuant to the model with respect
25 to one characteristic.

1 gawe 12

2 THE COURT: I don't see it. Can you assemble
3 what they want and meet with counsel and agree with them
4 what they have asked for.

5 MR. LAVIN: That's Government's Exhibit 1 through
6 7.

7 THE COURT: Are the checks in such shape so that
8 we are going to get them back the same way we sent them in?

9 MR. LAVIN: I think there's a record of them
10 somewhere in the transcript, your Honor.

11 THE COURT: Do you have elastic bands around them?

12 MR. STERN: They are segregated.

xxx

13 (Court's Exhibit 1 marked.)

14 MR. STERN: Your Honor, I have a problem. Both
15 myself and Mr. Lavin referred to a portion in the transcript
16 at page 327 that had to do with the Village Crier account
17 and the monies that went there. It was my recollection and
18 my client's recollection that Mr. Bertsch testified that
19 \$500 from the refund scheme went to this Village Crier busi-
20 ness and in the transcript, which Mr. Lavin read, the sentence
21 seems to leave out the words \$500. When Mr. Lavin read it
22 to the jurors, it appeared as if I had misstated the tran-
23 script because the 500 doesn't appear in there, although there
24 is a gap where it says "and Kevin gave Ray Nazzaro of this
25 refund scheme money to start this business."

1 gawe 13

2 I think that it would read "gave Ray Nazzaro
3 \$500 of this refund scheme."

4 THE COURT: For what it is worth, that's my recol-
5 lection of what he said. I don't know whether the reporter's
6 notes will indicate something they couldn't decipher or
7 what is the problem.

8 MR. STERN: The problem is, as soon as possible,
9 I would like it -- I would like it checked so the jury can
10 be instructed that in fact it reads as I told them.

11 THE COURT: If it does not show anything except
12 a gap, maybe you and Mr. Lavin can agree. I think, Mr.
13 Lavin, when you were referring to that in rebuttal, you
14 assumed \$500.

15 MR. LAVIN: That's correct, your Honor. I assumed
16 it because Mr. Stern mentioned it.

17 THE COURT: It was my recollection that Mr.
18 Bertsch testified there was \$500. The issue between you and
19 Mr. Lavin as I got it was, you were saying there was no \$500
20 deposit in the bank and he said that the testimony said it
21 was given, didn't say it was given in a check that was put
22 in a bank account.

23 MR. STERN: Right. I agree that it doesn't say
24 bank account there.

25 I'm afraid that the jury might have been left with

1 gawe 14

2 the impression when Mr. Lavin said --

3 THE COURT: I doubt that very much. If there's
4 any doubt about that, it's easy enough to clear it up, I
5 would assume. Either we will ask the reporter to check it--

6 MR. STERN: I of course I wouldn't mind the
7 stipulation.

8 THE COURT: If the two of you can agree that he
9 said it was \$500, fine. That is the easiest way to do it.
10 I don't rely on my recollection.

11 MR. LAVIN: I don't recall it.

12 MR. FELD: We can get the reporter's notes.

13 MR. LAVIN: I don't see why we have to waste
14 everybody's time.

15 MR. STERN: My client tells me that he remembers
16 specifically that it actually did include the words bank
17 account in that section. So I think we will have to check --

18 THE COURT: Can I see the transcript?

19 MR. STERN: Sure.

20 THE COURT: The reporter who took this is Gene
21 Levine. He has gone home. We will have to check with him in
22 the morning.

23 MR. STERN: Okay. I guess the problem that I'm
24 concerned about is there not be a verdict until it is cor-
25 rected. That's the problem I have.

1 gawe 15

2 THE COURT: Off the record.

3 (Discussion off the record.)

4 (9:30 p.m.)

5 (In open court, jury absent.)

6 THE COURT: I have another note, again headed

7 "Evidence."

8 "Handwriting charts-Frank and Kevin."

9 I guess we know what they are, the two handwriting
10 charts.

11 "Corporate resolution."

12 I suppose that means 37B.

13 Are both sides of the corporate resolution in
14 evidence?

15 MR. LAVIN: Yes, your Honor.

16 THE COURT: We ought to give them both sides.
17 Is that A and B?

18 MR. LAVIN: I believe so.

19 THE COURT: Is that agreeable to counsel?

20 MR. FELD: Yes, your Honor.

21 MR. STERN: Yes, your Honor.

22 THE COURT: Off the record.

23 (Discussion off the record.)

24 (Court's Exhibit 2 marked.)

25 (10 o'clock p.m.)

xxx

(In open court, jury absent.)

MR. STERN: Your Honor, Kevin has his asthmatic appointment tomorrow morning.

THE COURT: When?

MR. STERN: 9 o'clock he'll get to the doctor.

THE COURT: What time will he get here?

MR. STERN: I guess by 11.

THE COURT: What I would suggest, if this is agreeable, that we tell -- I was going to ask them to come in at 9 o'clock. Make it 9:30. If anything comes up of any kind where you feel that you don't want to go ahead until Kevin has gotten here, we will just have to wait for him.

MR. STERN: I think I have authorization to deal with notes.

THE COURT: All right.

MR. STERN: Is that true?

MR. K. MANGAN: Yes.

MR. STERN: My client authorizes me to deal with notes.

(Jury present.)

THE COURT: Ladies and gentlemen. I gather from the notes that you have sent me that you have been hard at work, but I know it is an awful long day for you. Unless

1 gawe 17

2 anybody violently objects, I suggest it is about time to
3 quit.

4 All right. What time do you want to start in the
5 morning? I have in mind two alternatives, 9 or 9:30.

6 JUROR NO. 3: I won't get home to 11:30 now.

7 THE COURT: 9:30 is all right with me if that
8 suits you all.

9 9:30 okay?

10 What about it, Miss Purden?

11 THE FORELADY: Everyone is a little -- some of
12 us have to drive home. It won't be to about 11:30 until we
13 get home. Some of us have to take trains and everything,
14 quite early trains.

15 THE COURT: The only thing that I'm sure you have
16 in mind is the sooner you start, the sooner you will be
17 finished.

18 THE FORELADY: I understand that. Everybody is
19 very tired here. Maybe if we had a little more time.

20 THE COURT: What do you suggest?

21 THE FORELADY: 10 o'clock.

22 THE COURT: Is that your consensus?

23 THE FORELADY: Yes, 10 o'clock.

24 THE COURT: All right. 10 o'clock tomorrow
25 morning.

1 gawe 18

2 Let me ask you this: Have we been responding
3 to your notes correctly?

4 THE FORELADY: Yes.

5 THE COURT: All right. We will begin at 10
6 o'clock tomorrow morning. When the jury assembles, Miss
7 Purdey, when you are all there, begin deliberating again.
8 Wait until all 12 are present, and until all 12 are present,
9 those who are here may not discuss the case, and of course that
10 is for any discussions outside of the jury room. The
11 limosines are standing by and everybody who wants a ride can
12 get one.

13 Have a good rest tonight and I'll see you at
14 10 in the morning.

15 (Jury absent.)

16 THE COURT: I suggest that everybody else in the
17 courtroom get a good rest tonight. Good night.

18 (Adjournment taken to June 17, 1977 at 10 o'clock
19 a.m.)
20
21
22
23
24
25

1 ele 1

2 UNITED STATES OF AMERICA

3 vs.

77 Cr. 165

4 FRANK MANGAN & KEVIN MANGAN

5 June 17, 1977
6 10:10 a.m.

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12

(In the robing room. Mr. Lavin and Mr. Stern

13

present.)

14

15

THE COURT: One of the jurors spoke to Fred this morning, about 9:30, I guess, and -- let me know if I am not reporting this accurately, Fred, and said that her grandmother died last night. She was obviously distraught. And she asked Fred to report it to me, and at that point or somewhere I guess at that point you said to her that you didn't want to discuss it with her because the marshal was supposed to have the only contact with the jurors.

20

21

22

That is it.

23

MR. STERN: Which juror was that?

24

THE COURT: Mrs. Rosoff. Number 9. I can't picture her. On her left is Mr. Morales, who I know.

25

1 ele 2

2 MR. LAVIN: The young woman?

3 THE CLERK: Comparatively.

4 THE COURT: Fred says she is Jewish and Jewish
5 people have funerals the next day, is that right?

6 MR. STERN: Yes.

7 THE COURT: I haven't gotten any official request
8 from her. I don't know quite what to do. My notion is to
9 wait until I hear from her.

10 MR. STERN: I think she wants -- I'm sure she
11 tried to get the communication through Fred.

12 THE COURT: Yes, but they know how to communicate.
13 They have communicated. It may be that she just wanted to
14 alert me to a possible problem; and I am inclined to think
15 that is it. Not that she wants to tell me that she's got an
16 urgent immediate problem.

17 I don't know if she has to attend to the funeral
18 or whatever. But if that is what's on her mind --

19 Do they have funerals on Saturday?

20 MR. STERN: Not on Saturday.

21 THE COURT: So if it is not today, it would be on
22 a Sunday. Is Sunday a day that is favored --

23 MR. STERN: No, it is just a plain old day.

24 THE COURT_ Obviously I would like to keep them
25 working today, but on the other hand obviously if she can't

1 ele 3

2 work, if she is so distraught that she can't be effective --
3 there is not much point in keeping her locked up in a room.

4 MR. LAVIN: I would agree with your Honor that
5 maybe we should wait a while and see if she sends you any
6 communication.

7 THE COURT: I would think we ought to do that. I
8 suppose it is not unlikely that we will get some more requests
9 from the jury, and maybe that will bring this to a head, if
10 it is going to be brought to a head at all.

11 MR. STERN: My feeling is that we ought to inquire
12 of her what it is that she means and how she feels. I don't
13 think we can leave it alone. We don't know what she intended
14 at all by her initial --

15 (Mr. Feld and Mr. Rosenblatt entered the robing
16 room.)

17 THE COURT: I was just telling Mr. Lavin and Mr.
18 Stern, about 9:30 this morning, some of the jurors were
19 already here, and one of them, Mrs. Rosoff, spoke to Fred and
20 said that her grandmother died last night and she was very
21 upset, and she obviously was, according to Fred. And she
22 asked that it be reported to me. And at that point Fred
23 said I can't discuss it with you any further, Fred having in
24 mind that the only person to make contact with the jury was
25 the marshal. We have just begun to debate what to do about

1 ele 4

2 it. I said that my view is that since I haven't gotten
3 anything official from her, they know how to communicate
4 with the Court, they have done it twice, to wait until we get
5 something official, or at least until -- if we get another
6 note maybe we will have to talk to them anyway.

7 Mr. Stern, however, I think feels that we ought to
8 find out from her what her situation is. It may be that she
9 wasn't making anything other than a report, that there may
10 be a problem which hasn't arisen yet. It may be, however,
11 on the other hand, that she is very upset and thinks she
12 ought to be someplace else and as a consequence will not be
13 able to participate in anything effective today.

14 I would be disappointed, to say the least, if we
15 can't have them here all day. I had not planned to keep
16 them tomorrow or Sunday.

17 MR. LAVIN: I feel we should wait at least an
18 hour or so. Maybe at that point we might --

19 THE COURT: It seems to me that that isn't an
20 unreasonable suggestion because if she's got something that
21 is very much on her mind that she has to do, like attend a
22 funeral, she should raise it.

23 MR. LAVIN: If she is distraught, she might know
24 better two or three hours from now.

25 MR. STERN: Your Honor, I don't think we can leave

1 ele 5

2 this to speculation.

3 MR. LAVIN: It is speculation at this point.

4 MR. STERN: I don't think we should just rest on
5 speculation at this point.

6 THE COURT: I don't know if it is accurate to
7 call it speculation. All we know is that she has asked that
8 this be reported to me, period. It has been reported to me
9 and that's all I know. She hasn't reported or made any request
10 to the marshal.

11 MR. STERN: I think we have a duty to inquire.
12 A grandmother dying is a very serious matter. We can't
13 guess that she is able to deliberate and let her go for two
14 hours and if she is not deliberating and just gives up because
15 she can't think or something, and she may be an important --

16 THE COURT: My point is that I would suppose we'd
17 hear about that.

18 MR. STERN: That is supposition, your Honor. I
19 think it is too important a matter to have suppositions
20 about.

21 MR. LAVIN: I think that is the normal case, your
22 Honor.

23 THE COURT: Are they all here?

24 THE CLERK: Yes, your Honor.

25 MR. LAVIN: She's stated that, and I think if she

1 ele 6

2 wanted anything else to be done about it, she would have told
3 us at this point.

4 MR. STERN: She has already reported it.

5 MR. LAVIN: One of the jurors reported an obscene
6 phone call.

7 Fred, what was her condition when she reported it
8 to you?

9 THE CLERK: Emotional.

10 THE COURT: That is understandable.

11 MR. FELD: Perhaps your Honor could let her know
12 that you have received the report and in fact it has been
13 transmitted to you, and ask, is there anything else that you
14 want to tell me, and leave it at that.

15 MR. STERN: I'm not satisfied, your Honor. I
16 think the woman ought to be asked whether she can continue
17 her deliberations and give it everything she's got.

18 THE COURT: My problem with that is -- maybe this
19 isn't being fair to her, but my problem is that it may be that
20 she can very well continue with her deliberations today, but
21 if given the opportunity to say that she'd rather not, she
22 will do so.

23 MR. LAVIN: I think that is the problem.

24 MR. STERN: If that is true, if she would rather
25 not --

1 ele 7

2 THE COURT: No, but she will say it and it isn't
3 necessarily so.

4 MR. STERN: We can't psychoanalyze here.

5 THE COURT: I don't know that we have to reach
6 the point of psychoanalyzing. If we talk to her and she
7 tells us that she isn't able to continue deliberating today
8 and she wants to be excused, I don't think we have much
9 choice. She hasn't said that to us yet. I don't know that
10 we should suppose that she is going to say it until she
11 says it. I fear that if she is given to understanding, just
12 because we put it to her, that she can get off today, that
13 she will tell us without qualification whatever she thinks
14 will enable her to get off today, and I'm not prepared to
15 assume at the present time that it is necessary.

16 MR. STERN: But that is the point. The point is
17 she may not know that if she is distraught and emotional and
18 cannot deliberate, she may not realize that --

19 THE COURT: She knows that Mrs. Herman was
20 excused because she wasn't well.

21 MR. STERN: Yes, but she also knows now that there
22 are no alternates left and if she doesn't stay here and
23 deliberate that there may mean a delay.

24 THE COURT: I assume she understands that.

25 MR. STERN: She may feel that she can't be the

1 ele 8.

2 one responsible for that delay and therefore she will not
3 report it, she will not say that I cannot continue, she will
4 just go in there and perhaps not argue, perhaps not deliberate
5 because she can't, but she also thinks --

6 THE COURT: I don't know that we have to suppose
7 that much.

8 MR. STERN: We are all sitting here supposing
9 because we can't inquire.

10 MR. LAVIN: I don't think we should inquire at
11 this point. I think that is exactly what Mr. Stern wants,
12 frankly, is that the jury will come in here and faced with
13 the choice of perhaps leaving even though she is not emo-
14 tionally disposed, she will say I'd like to leave. At that
15 point we are at least over to Monday, and the possibilities of
16 another juror getting sick, as we have had two already in
17 this case happening, I think we should leave it --

18 THE COURT: What happened to the first juror?

19 MR. LAVIN: He was sick. He had a fever as well.

20 THE COURT: Yes, I remember.

21 MR. LAVIN: I have been in cases, your Honor,
22 where jurors have had deaths in the family and they have
23 continued to deliberate.

24 MR. STERN: Without inquiry?

25 MR. LAVIN: Without inquiry.

1 ele 9

2 MR. STERN: I think it is objectionable.

3 MR. FELD: I would join in Mr. Stern's applica-
4 tion, that we have some form of inquiry, in fairness to her.

5 MR. STERN: And to the defendants.

6 THE COURT: We may have to do that. I see no
7 harm, however, in waiting for at least -- we have waited a
8 half hour already since they formally went into session and
9 I see no harm in waiting for another half hour at least.

10 MR. STERN: If in that half hour there is a ver-
11 dict and it has to do with the fact that she couldn't
12 deliberate, if she is perhaps one juror who is arguing or
13 deliberating one way or the other, then we will have lost the
14 entire point.

15 THE COURT: No, I don't know that we will have.
16 If there is a verdict in the next half hour, which I regard
17 as so unlikely that it is almost reasonable to say that it
18 is impossible, but if we did get a verdict in the next half
19 hour, I think we are entitled to assume that it was with her
20 full participation.

21 MR. STERN: I don't know how. We have just been
22 talking about how it might not be because she is so dis-
23 traught.

24 THE COURT: If they go ahead and reach a verdict,
25

1 ele 10

2 why aren't we entitled to assume that she was prepared to
3 do so.

4 MR. LAVIN: Mr. Stern is assuming that she is so
5 distraught. I don't think there is any proof that she is.

6 MR. STERN: Fred told us she was.

7 MR. LAVIN: Fred told us what the woman told him.

8 MR. STERN: And her condition was emotional.

9 THE COURT: I would be surprised if somebody
10 wasn't emotion after they had lost a grandmother.

11 MR. LAVIN: Your Honor, I think we are just asking
12 for trouble if we bring her out. As you suggested she might
13 or probably will say, I want to leave. She understands the
14 verdict has to be 12 people here -- it is unfortunate, but
15 it's -- you know, there are a lot of other considerations
16 besides her, unfortunately. If she is that distraught, I
17 think she'd let your Honor know.

18 THE COURT: Well, the principal consideration,
19 of course, is -- there are several considerations, some of them
20 conflicting. But certainly one of them is that there are
21 11 other jurors who I think are anxious to get this behind
22 them.

23 MR. STERN: There are also two defendants whose
24 lives depend on the verdict.

25 THE COURT: I said there were a lot of considera-

1 ele 11

2 tions, many of which are conflicting. Do you have her card?

3 MR. CLERK: Yes, your Honor.

4 THE COURT: Anybody remember anything about the
5 voir dire?

6 MR. FELD: She comes from Riverdale. She is an
7 editor at Simon & Schuster; the publisher. She is married.

8 (Pause.)

9 THE COURT: I think we will wait until 11 o'clock
10 at least.

11 What about that transcript problem?

12 MR. STERN: It doesn't appear in Mr. Levine's
13 notes.

14 THE COURT: I meant to say last night something,
15 and I didn't think to say it, I forgot to say it after I
16 thought of it. It didn't seem to me that the jury would feel
17 in any way that you had tried to mislead them. All that
18 Mr. Lavin did was when he re-read the portion, was to say,
19 "and I assume \$500," which if anything suggested that he was
20 accepting your position that it was \$500, not that you had
21 tried to mislead them by something.

22 MR. LAVIN: I hadn't read it before. That is why
23 when I came to it, I read it.

24 MR. FELD: Was there anyone else that recalls
25 whether it was \$500?

1 ele 12

2 MR. FELD: This was in Bertsch's testimony on the
3 Village Crier?

4 MR. STERN: Yes.

5 MR. FELD: I remember he said it was \$500. He
6 said he had given Nazzaro -- Nazzaro had received \$500.

7 THE COURT: I have no recollection one way or
8 another of reference to a bank account.

9 MR. FELD: That I don't recall.

10 MR. LAVIN: I think Mr. Stern has the best, I
11 didn't say it wasn't there, I just said I assumed it was
12 \$500.

13 THE COURT: I don't know whether that is the
14 right way to put it, Mr. Lavin, that he has the best of it,
15 but I don't think there is any problem that you need be
16 concerned about. The way it was dealt with, I don't think
17 I believe that the jury understood that you weren't trying
18 to mislead them.

19 MR. STERN: My client was quite adamant on it.

20 THE COURT: What do you suggest we do about it?

21 MR. STERN: I wonder if we could probably agree
22 to have the transcript include \$500, I think there is a space
23 there where it fits, between "Nazzaro" and "of", because the
24 way it says now, it says Ray Nazzaro's of this refund
25 scheme --

1 ele 13

2 THE COURT: "Gave of this refund scheme."

3 MR. LAVIN: I don't think we can correct the
4 transcript, your Honor. It is the jury's recollection --

5 THE COURT: We can do it by stipulation, I sup-
6 pose.

7 MR. LAVIN: I don't know wher -- I recall
8 the figure of \$500 --

9 THE COURT: Is there any other place in the tran-
10 script where the figure would have appeared?

11 MR. STERN: No. Either we can agree by stipula-
12 tion and then the correction can be made, and if there is a
13 disagreement, then your Honor has to just decide. That is
14 the way it's been done in the past.

15 MR. LAVIN: I'm not trying to be difficult. I
16 just don't recall exactly. I would have questioned.

17 MR. STERN: The three of us do.

18 MR. LAVIN: It is just the jury's recollection.

19 MR. STERN: I am just thinking of appeal.

20 MR. LAVIN: It is on the record, your Honor.

21 MR. STERN: What's on the record?

22 MR. LAVIN: The discussion about the \$500.

23 MR. STERN: No, it is not on the record, it is
24 missing in the transcript.

25 MR. LAVIN: But it is on this record.

1 ele 14

2 THE COURT: What about doing this: I could
3 read the portion to the jury as it appears in the transcript
4 and say that "My recollection is that the witness used the
5 figure \$500, but as I told you, it is your recollection of
6 what he said that counts, and if there is something that you
7 are considering, you will have to determine from your own
8 recollection what was said and what was not said."

9 MR. LAVIN: I would object. I don't think we
10 should read anything to the jury at this time. They haven't
11 asked anything about it. They have already been told that
12 their recollection controls. No one has said, I didn't
13 say that \$500 wasn't in there. My point is the bank account.

14 THE COURT: In fact you had assumed it was there.

15 MR. LAVIN: If it is a question of appeal that is
16 different. But I don't think we should call in the jury and
17 tell them something we haven't been asked about.

18 THE COURT: What's the issue on appeal that you
19 foresee?

20 MR. STERN: I don't know if there will be a
21 specific issue with reference to that, it is just that Kevin
22 feels very strongly that he heard that said, 500, and we
23 made an issue of it and they brought Mr. Nazzaro in and asked
24 him about \$500 --

25 THE COURT: And he said that there wasn't \$500

in the bank account.

(The marshal entered the robing room with a note.)

THE COURT: I have forgotten whether he said he received it, I thought it was just his testimony that there wasn't 500 in the bank account. Here we are.

"Due to a death in the family of one of the jurors we respectfully request to be excused until Monday in order to permit the juror to attend the funeral this afternoon. Because of the emotional stress involved we feel it would not be fair to both defendants, the other jurors and the Court."

I don't think we can do much with that. Does anybody disagree?

MR. LAVIN: No.

MR. FELD: No.

MR. STERN: No.

THE COURT: This is a request by the jury.

(End of robing room.)

(In open court, jury absent.)

MR. LAVIN: Your Honor, I wonder if we might inquire, since the jury is going to be gone for three days, whether they have reached a verdict with respect to any of the counts. I think it is appropriate at this time.

THE COURT: I don't think it is, Mr. Lavin. I don't want to take a partial verdict after they have only been

1 ele 16

2 deliberating three and a half hours.

3 MR. STERN: Your Honor, Kevin, as we discussed
4 last night, is at the doctors, and I wonder if your Honor
5 could just explain that he is there and that is why he is not
6 here.

7 MR. LAVIN: I'd object to that again, your Honor.

8 THE COURT: I will say what I said before, that
9 I have excused him, that he is planning to arrive shortly,
10 but I have excused him for being late, for not being here at
11 this time.

12 All right, bring the jury in.

13 (Jury present.)

14 THE COURT: Good morning, ladies and gentlemen.

15 First, Mr. Kevin Mangan is not here at the moment.
16 I have excused him. He will be here very shortly. I have
17 your note, Miss Purdy. I will read it.

18 "Due to a death in the family of one of the jurors
19 we respectfully request to be excused until Monday in order to
20 permit the juror to attend the funeral this afternoon.
21 Because of the emotional stress involved we feel it would not
22 be fair to both defendants, the other jurors and the Court.
23 Thank you. Catherine A. Purdy, Forelady."

24 Of course I am going to grant your request. We
25 want you to know, Mrs. Rosoff, that we all extend to you

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2 our sympathy, and we are all very sorry that in addition to
3 your present burdens, you have to bear this one. Mrs. Purdy,
4 would 9 o'clock Monday morning be all right?

5 THE FORELADY: Surely.

6 THE COURT: All right. Thank you.

7 Ladies and gentlemen, you will of course remember
8 my admonition. Be sure you don't talk about the case with
9 anybody.

10 (The jury left the courtroom.)

11 (Court's Exhibit 3 marked.)

12 THE COURT: I guess the only matter that is pend-
13 ing is that \$500 matter, and I don't know what the right
14 solution is.

15 MR. STERN: My suggestion, your Honor, is simply
16 to instruct the jury that sometimes there are errors in the
17 transcript, and that in this case it is the recollection of
18 your Honor and of counsel -- unless we can stipulate, I don't
19 know -- that \$500 was omitted from that section.

20 THE COURT: That is a solution which at least
21 part of which I have suggested. I'm reluctant to even sug-
22 gest to the jury that my recollection is such and such. And
23 I don't think I ought to suggest to the jury that it is the
24 recollection of two of the three counsel that it is such and
25 such.

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2 MR. STERN: The alternative would be to stipu-
3 late that it goes in there and simply to read the corrected
4 portion.

5 THE COURT: This is another alternative. And
6 there is a third alternative, which is to do nothing.

7 MR. LAVIN: Your Honor, why are we going to read
8 the transcript to the jury? That is going to make me look
9 like I have somehow misled the jury in my remarks. They
10 haven't asked for this. I mean if there is a question of
11 whether or not it is in, it is on the record for the Court
12 of Appeals.

13 THE COURT: It seems to me what Mr. Lavin said
14 was, "I assume \$500." I don't think there is any reason
15 to suppose that the jury feels that you were trying to mis-
16 lead them or that the record is incomplete. I don't know
17 what Mr. Nazzaro's testimony was precisely, but whatever his
18 testimony is, is unrebutted. So I don't think I will do
19 anything about it unless something comes up that makes it
20 clear that we need to.

21 MR. STERN: When you say unrebutted, Mr. Nazzaro
22 rebutted it in the sense that he did say he didn't receive
23 any \$500 from a refund scheme.

24 THE COURT: I say, there is no answer to his
25 testimony. Whatever he said is unrebutted. That is what I

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2 meant to say, and that is what I thought I said. If Mr.
3 Nazzaro said "I didn't receive \$500" so be it.

4 MR. STERN: I see what you mean. I thought you
5 were talking about Mr. Bertsch.

6 THE COURT: No.

7 MR. STERN: Well, I made my request.

8 THE COURT: All right. See you Monday morning at
9 9 a.m.

10 (Adjournment taken to Monday, June 20, 1977 at
11 9 p'clock a.m.)

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Judge Stewart

UNITED STATES OF AMERICA

1708

vs.

77 Cr. 165

FRANK MANGAN and KEVIN MANGAN

June 20, 1977 - 9:45 a.m.

- - -

THE COURT: Good morning, gentlemen.

I have a note from the jury which reads, as usual, the heading, "Evidence, The income tax tape print-outs."

Are we clear on what that means?

MR. FELD: I think we are, your Honor.

MR. LAVIN: Exhibits 11 through 18.

(Court's Exhibit 4 was marked.)

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2 (2:22 p.m., a note was received from the
3 jury.)

4 THE COURT: I have a note that the jury has
5 reached a verdict.

6 (The jury entered the courtroom.)

CERTIFICATE OF SERVICE

November 17, 1977

I certify that a copy of this notice of motion and affidavit has been mailed to the United States Attorney for the Eastern District of New York *and to co-counsel.*

Terry Wintner